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No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

S.M. PIRES and VIRGINIA PIRES, his wife,

Petitioners,

vs.

FROTA OCEANICA BRASILEIRA S.A.,

Respondent,

EDUARDO LOPEZ as Executor for the Estate of FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.), OMNIUM AGENCIES INC., J. DIXON BYRNE as Executor for the Estate of JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES and CITY OF GALVESTON d/b/a PORT OF GALVESTON,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

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QUESTIONS PRESENTED

1. Should trial and lower appellate courts comply with *O'Donnell v. Great Lakes Dredge and Dock Company*, 318 U.S. 36 (1943); *Hopson v. Texaco*, 383 U.S. 262 (1966); and *Braen v. Pfeifer Oil*, 361 U.S. 129 (1959) by submitting issues of fact including Causal Connection and Foreseeability to a jury resulting from a Jones Act accident away from a vessel or should said issues be summarily dismissed by trial and lower appellate courts without submission of same to a jury?

The Appellate Division's response was to summarily dismiss without submission of the issues of fact to a jury in compliance with *Wheeler v. West India, S.S. Co.*, 103 F.Supp. 631, aff'd, 205 F.2d 354, cert. den. 346 U.S. 889 and *Ugarte v. United States Lines, Inc.*, 105 AD2d 606 contrary to the above decision.

2. Should a trial court in a jury trial presiding over a General Maritime Law Maintenance and Cure trial add pre-judgment interest when the jury response to interrogatories was to render a separate award for past and future Maintenance and Cure damages?

The Appellate Division responded to this issue by striking the trial court's addition of pre-judgment interest to damages specifically assigned as *past damages* until the date of the trial.

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OPINIONS BELOW

S.M. Pires and Virginia Pires, his wife, seek certiorari to review the Memorandum Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, officially reported at 161 A.D.2d 129, 554 N.Y.S.2d 855 (1st Dept. 1990) (A-1). The opinion and order of the Appellate Division are reprinted as Appendices A, C and D, respectively. (1a)(22a)(24a).

The decision and order of the lower court are not officially reported and are reprinted at Appendices B and G, respectively. (6a)(33a).

JURISDICTION

The Orders of the New York State Supreme Court, Appellate Division, First Department were entered on May 1, 1990, reversing the order below (summary judgment) and modifying the order below (pre-judgment interest).

Petitioners Pires motion to reargue or for leave to appeal to the Court of Appeals was denied by the Appellate Division order dated July 26, 1990 (41a).

Pires' motions for leave to appeal and motion to reargue denial of leave to appeal were both denied by New York Court of Appeals orders dated November 27, 1990 (42a) and March 21, 1991 (43a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Jones Act, 46 U.S.C. §688 (1975) provides that:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an

action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

STATEMENT OF THE CASE

In this admiralty and maritime, Jones Act case, Petitioners seek review of the May 1, 1990 Appellate Division dismissal of their Jones Act case, and denial of their right to pre-judgment interest.

I. THE FACTS

Seaman Pires was seriously injured and suffered a leg amputation when a railroad freight car backed over him as he crossed railroad tracks in Galveston, Texas.

He was on ship's business, going to town to buy protective rubber gloves for his hands, burned from ship's cleaning chemicals. The ship refused and/or failed to supply him with protective gear. The ship's officer directed him on the route to go to town to buy the gloves.

The respondent shipowner abandoned Pires in a Galveston hospital, and subsequently refused to pay maintenance and cure.

II. THE PROCEEDINGS BELOW

In November 1976, Pires commenced the subject action against Frota and other named defendants in New

York State Supreme Court alleging a personal injury claim under 46 U.S.C. §688 (the "Jones Act") and the general maritime law of unseaworthiness.

The Frota and Omnium defendants motions for summary judgment, removal to the federal court, forum non conveniens, and for protective orders to prohibit plaintiffs discovery, effectively prevented plaintiffs from prosecuting their Jones Act case.

Pires filed a note of issue to try his claim for maintenance and cure only, obtained a jury verdict in his favor (A-31) which has been affirmed on appeal and reviewed by the Court of Appeals and this United States Supreme Court, which denied Respondent Frota's petition for certiorari on June 10, 1991 and application for a stay, denied by Justice Thurgood Marshall, February 19, 1991.

Pires has not completed pre-trial discovery, and never filed a note of issue to try his Jones Act claim.

Justice Greenfield denied Respondent's motion for summary judgment to dismiss the Jones Act case (A-33) because questions of fact existed (A-35).

The May 1, 1990 order of the Appellate Division decided the issues of fact on respondent's appeal, and dismissed Pires' Jones Act case, and denied Pires prejudgment interest on the maintenance and cure award.

REASONS FOR GRANTING WRIT

THIS COURT NEEDS TO RESOLVE THE CONFLICT BETWEEN FEDERAL CIRCUITS ON THE ISSUE OF THE DISMISSAL OF A JONES ACT ACCIDENT OCCURRING OFF THE VESSEL

The Appellate Division, First Department, automatically dismissed a Jones Act accident which occurred off the vessel, (1a) affirmed by the Court of Appeals of the State of New York (42a-43a), said dismissal *wholly relied* upon *Wheeler v. West India, S.S. Co.*, 103 F.Supp. 631, aff'd, 205 F.2d 354, cert. den. 346 U.S. 889. This decision post-dated a pertinent decision of this Court in *O'Donnell v. Great Lakes Dredge and Dock Company*, 318 U.S. 36 (1943), and was prior to this Court's decisions of *Braen v. Pfeifer Oil*, 361 U.S. 129 (1959), and *Hopson v. Texaco*, 383 U.S. 262 (1966).

All three decisions by this Court specifically directed that Jones Act accidents occurring off a vessel, should not be automatically dismissed because of their location, but that all issues of fact and causation must be submitted to the jury for its determination.

The New York State Supreme Court, Appellate Division, First Department, (2a) though recognizing that this action was based upon the Jones Act rejected this Court's directions contained in the above decision and refused to comply with a plethora of this Court's controlling authorities, when they admitted, "the plaintiff was on ship's business at the time of the accident." Their ultimate conclusion of dismissal totally disregarded the meaning of the Jones Act.

The First Department finding rejected all of the controlling Jones Act-FELA authorities when they usurped

the jury's right to determine the issues of proximate cause: (3a)

> "In the instant case, there is neither a sufficient showing of any violation of defendants-appellants' duty of care, nor any evidence that such violation, if any, was the proximate cause of plaintiff's injuries."

Certiorari is sought, because this court's decisions encompassed in *O'Donnell-Hopson-Braen, supra,* direct that all of the issues involved in litigation arising from accidents which occurred away from the vessel must be submitted to a jury. The Second Circuit Court of Appeals, the New York State Court of Appeals and one bench of the Ninth Circuit *now* automatically dismiss Jones Act accidents occurring off the ship without submission of any issues to the jury.

In contrast the Third, Fifth, Sixth, Seventh and one bench of the Ninth Circuit have complied with all of this Court's pertinent decisions, by rejecting automatically motions to dismiss, and instead submitting disputed issues of fact, causation and foreseeability to a jury.

The resolution of this issue is extremely important because there are multitudinous instances like this one where the accident occurred off the vessel but the Jones Act negligence originated on the vessel.

There are two separate lines of authorities originating from this Court and controlling Jones Act-FELA actions that impact this factual pattern and subsequent dismissal of this cause of action.

The first group of authorities issued by this Court involves a more general application of the Jones Act-FELA to issues of fact, causation and foreseeability.

The second group of authorities from this Court previously mentioned, are more specifically directed to this Court's rulings involving Jones Act accidents occurring away from the vessel.

The first series of this Court's authorities are founded in this Court's recognition that the Jones Act is beneficient, remedial legislation that was promulgated by our federal legislature to promote the health, welfare and safety of the American seaman. See *Cosmopolitan Shipping Co. v. McAllister,* N.Y. 1949, 69 S.Ct. 1317, 337 U.S. 783, 93 L.Ed. 1692; *Garrett v. Moore-McCormack Co.,* Pa. 1942, 63 S.Ct. 246, 371 U.S. 239, 87 L.Ed. 239; *De Zon v. American President Lines,* C.C.A. Cal. 1912, 129 F.2d 404, affirmed 63 S.Ct. 814, 318 U.S. 660, 87 L.Ed. 1065, rehearing denied 63 S.Ct. 1025, 319 U.S. 780, 87 L.Ed. 1725.

The passage of the Jones Act has entirely altered the stringent common law negligence parameters of causal connection and foreseeability to the point where they presently barely exist.

The Appellate Division acknowledged that seaman Pires "was acting in the course of his employer's business" by travelling ashore alone at night to obtain medication to heal his wounds sustained on board the vessel and to protect them by purchasing protective clothing. (2a).

The Appellate Division decision (1a) recognized all of the following shipowner's negligent acts in their decision:

a) Seaman Pires was unfamiliar with the Port area. (3a)

b) that the ship's engine officers were negligent in not warning Pires of the hidden dangers present adjacent to the vessel in the Galveston Wharves railroad yard. (3a).

Frota Oceanica regularly employed all of its vessels in its unitary bulk cargo service in the grain trade between Houston and Galveston picking up cargo of grain between Houston, Galveston and Brazil. Frota Oceanica was not a stranger to the Port of Galveston. (2a).

c) that having permitted Pires ashore at night he should have been equipped with a flashlight. (3a).

d) that Seaman Pires was on land in furtherance of the ship's business to find medical aid and protective clothing because the ship was unable to furnish him either item. (2a).

Frota Oceanica employed a regular agent, Dalton Steamship Company, who was equipped and able to provide all of the shoreside services including transportation for medical care, protective clothing, in addition to being able to warn ship's officers of hidden, dangerous and hazardous conditions ashore.

The First Department recognizing that issues of fact, causation and foreseeability existed, usurped the jury's right to determine those disputed issues.

POINT I

THIS COURT'S DECISION IN JONES ACT-FELA CASES HAVE SPECIFICALLY DIRECTED THAT CAUSAL CONNECTION AND FORESEEABILITY ARE SOLELY ISSUES FOR A JURY AND THEY ARE NOT TO BE USURPED BY A TRIAL COURT

This Court pointed out in *Tenant v. Peoria & P.U. Ry. Co.,* 321 U.S. 29, 35 (1944), that only the jury is capable of determining conflicting inferences, and these conflicts must be submitted to the jury for its determination.

In *Lavender v. Kurn,* 327 U.S. 645 (1946), this Court pointed out that in FELA cases the jury is permitted to speculate and conjecture in arriving at the jury verdict, and their freedom to do so cannot be impaired by any court which seeks to usurp the jury's authority.

This Court said, in 1956, in *Schulz v. Pennsylvania Railroad,* 350 U.S. 522, wherein the deceased *Schulz* was a fireman on a tug who disappeared from his post, and after several days his drowned body was found clutching a flashlight:

> *. . . The District Judge directed the jury to return a verdict for the defendant, stating, "There is some evidence of negligence, and there is an accidental death. But there is not a shred of evidence connecting the two. The Court of Appeals affirmed, saying that while the evidence was "perhaps at most only doubtfully sufficient to present a jury question as to defendant's breach of duty" it failed to show "where the accident occurred" or "that it was proximately caused by any default on the part of the defendant."*

> The jury trial "is part and parcel of the remedy afforded railroad workers under the Employer's Liability Act," which the Jones Act makes applicable to those working as petitioner's husband was here. The Seventh Amendment to the Constitution provides that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law." We granted certiorari to consider the failure of the District Court to let this case go to the jury. 350 U.S. 882.

This Court's decisions involving Jones Act and FELA matters virtually extinguished foreseeability and reduced causal connection to a threshold considerably less than that of the usual common law negligence standard. In fact, foreseeability and causal connection are barely visible in these actions.

This Court's decisions uniformly hold that no issues of fact including causal connection and foreseeability be withheld from a jury. On the contrary, for a trial or appellate court to refuse to submit these issues to a jury is reversible error.

The Appellate Division, in usurping the jury's authority by making a factual determination that Pires' Jones Act claim lacked causal relationship, is discarding this Court's General standards for Jones Act-FELA causes of action.

The Appellate Division is diametrically opposite to this Court's instructions to lower courts for determining disputed Jones Act-FELA factual issues.

Compare the Appellate Division's application of its common law tort standard with this Court's application of a far less stringent threshold in the following decisions.

In *Tiller v. Atlantic Coast Railway,* 318 U.S. 54 (1943), the Circuit court dismissed an FELA action because the trial court removed from the jury's consideration the right to determine the issues in a FELA case. The primary issue in this case was assumption of the risk:

> *No case is to be withheld from a jury on any theory of assumption of risk; and questions of negligence should under proper charge from the court be submitted to the jury for their determination.* Many years ago this Court said of the problems of negligence, "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." *Jones v. East Tennessee, V. & G.R. Co.,* 128 U.S. 443, 445. Or as we have put it on another occasion, "Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences," the case should go to the jury.

In *Schulz v. Pennsylvania Railroad,* 350 U.S. at 525-526:

> In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. "[*W*]*e think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide ques-*

tions as these as well as others." Jones v. East Tennessee, V. & G.R. Co., 128 U.S. 443, 445 (1888).

In this case petitioner is entitled to recover if her husband's death resulted "in whole or in part" from defendant's negligence. Fair-minded men could certainly find from the foregoing facts that defendant was negligent.

. . .

In *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963), a railway employee while working along the railroad right of way adjacent to a stagnant pool of water containing vermin was bitten by an insect and suffered an injury that resulted in the amputation of both legs.

Defendant's contention was that there was no reasonable probability or foreseeability that the railroad would have anticipated stagnant pools would invite vermin and insects.

This Court, relying on *Rogers v. Missouri Pacific Co.*, 352 U.S. 500, 506, recognized that reasonable foreseeability and causal connection were issues, but those were factual, and even under a factual pattern like this in *Gallick*, those issues must be submitted to the jury and the Supreme Court would not reverse a jury finding in favor of the plaintiff.

This Court responded to the railroad contention that an insect bite was foreseeable, but the likelihood of harm from an insect bite would not be foreseeable:

"The jury had been instructed that negligence is the failure to observe that degree of care which people of ordinary prudence and sagacity would use under same or similar circumstances; and that defendant's duty was measured by what a reasonably prudent person would anticipate as resulting from a particular condition—'defen-

> dant's duties are measured by what is reasonably foreseeable under like circumstances'—by what 'in the light of facts then known, should or could, reasonably have been anticipated.' "

This Court also particularly instructed all other courts that in a Jones Act case, foreseeability never rises to the identical level as a common law tort action, and the shipowner can be found liable, even if he does not foresee the consequences of his act. *Gallick v. Baltimore & Ohio RR Co., supra:*

> "The jury had been instructed that negligence is the failure to observe that degree of care which people of ordinary prudence and sagacity would use under same or similar circumstances; and that defendant's duty was measured by what a reasonably prudent person would anticipate as resulting from a particular condition—'defendant's duties are measured by what is reasonably foreseeable under like circumstances'—by what 'in the light of facts then known, should or could, reasonably have been anticipated.' "

This Court also particularly instructed all other courts that in a Jones Act case, foreseeability never rises to the identical level as a common law tort action, and the shipowner can be found liable, even if he does not foresee the consequences of his act. *Gallick v. Baltimore & Ohio RR Co., supra:*

> ". . . It is widely held that for a defendant to be liable for consequential damages he need not foresee the particular consequences of his negligent acts: assuming the existence of a threshold tort against the person, then whatever damages flow from it are recoverable. . . ."[9]

In 1957, this Court simultaneously rendered two decisions: one under the Jones Act, *Ferguson v. Moore Mc-*

Cormack, 352 U.S. 521, and one under the FELA (*Rogers v. Missouri Pacific,* 352 U.S. 500.

The identical principles of causation applied to both decisions. In *Ferguson, supra,* the Court of Appeals for the Second Circuit reversed a jury verdict in favor of an injured seaman, holding it was not within the realm of reasonable foreseeability that the petitioner would use a knife to chop frozen ice cream:

> "What happened was that the seaman having a knife used his fingers and in so doing severed his fingers."

This Court's decision in both cases, *Ferguson* and *Rogers* is applicable hereto because this Appellate Division, when it dismissed, usurped the jury's authority to render a jury determination with regard to foreseeability and causal connection:

> Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a preeminent role in these Jones Act cases (*Jacob vs. City of New York,* 315 U.S. 752, 1942 A.M.C. 616: *Schulz vs. Pennsylvania R. Co.,* 350 U.S. 523, 1956 A.M.C. 737), could conclude that petitioner had been furnished no safe tool to perform his task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record, fair minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished to him. See *Schulz v. Pennsylvania R. Co.,* 350 U.S. 523, 526, 1956 A.M.C. 737. Since the standard of liability under the Jones Act is that

established by Congress under the Federal Employees Liability Act, what we said in *Rogers vs. Missouri Pacific R. Co.*, — U.S. — (decided this day) is relevant here:

"Under this statute the test of a jury case is simply whether the proofs justify with reason an inference that employer negligence played any part even the slightest producing the injury or death for which damages are sought."

Because the jury could not have so concluded the Court of Appeals erred in holding that respondent's motion for a directed verdict should have been granted. "Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function." *Wilkerson vs. McCarty*, 336 U.S. 53, 62. Reversed.

Ferguson reduced reasonable foreseeability to the point where it becomes barely noticeable. Though all of these authorities were brought to the Appellate Division's attention, they persisted in applying an erroneous burdensome standard of common law tort negligence to Jones Act causal connection and foreseeability.

The Lower Federal Appellate Courts in reliance on this Court's prior decision in Jones Act-FELA cases, uniformly hold causation and foreseeability are "featherweight", see *Landry v. Two R Drilling*, 511 F.2d 138, 142; *John Wayne Davis v. Hill Engineering*, 549 F.2d 314 (1977); *Comeaux v. T.L. James*, 702 F.2d 1023.

POINT II

THIS COURT DIRECTED IN JONES ACT CASES OCCURRING OFF THE SHIP THAT ALL ISSUES OF FACT INCLUDING CAUSAL CONNECTION AND FORESEEABILITY MUST BE SUBMITTED TO THE JURY. THE SECOND AND NINTH CIRCUITS AND COURT OF APPEALS OF THE STATE OF NEW YORK REJECT THIS COURT'S DIRECTIVE

This Court ruled in *O'Donnell v. Great Lakes Dredge and Dock Co., supra,* that the Jones Act is a negligence statute which applies even if the seaman is injured off his vessel.

In *Braen v. Pfeifer Oil Transp. Co., supra,* Justice Douglas writing for this Court recognized that injuries occurring off the vessel may not be automatically dismissed when this Court held:

> "the fact that the injury did not occur on the vessel, is not controlling" (citations omitted).

Justice Douglas, on behalf of this Court outlined the history of seamen's accidents occurring off the vessel when he relied on *Aguilar v. Standard Oil Co.,* 318 U.S. 724 in his opinion:

> "It was there recognized that a seaman is as much in the service of his ship when boarding it on first reporting for duty, quitting it on being discharged, or going to and from the ship while on shore leave, as he is while on board at high seas.

This Court said that a seaman can be "in the course of his employment" when he sustains an injury off the

ship; it all depends on facts that can be submitted to a jury as to whether there is liability under the Jones Act.

> "Petitioner was acting 'in the course of his employment' at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders. No more is required by the Jones Act, as the *O'Donnell* case indicates, petitioner being a seaman who was injured as a consequence of the negligence of his employer.
>
> The judgment of the Court of Appeals is reversed and the judgment of the District Court is reinstated.

In 1966 in *Hopson v. Texaco, supra,* this Court in a *per curiam* decision again refused to automatically dismiss a Jones Act action brought by two seamen who were injured in an auto collision between their taxi and a truck some 50 miles from their vessel.

This Court in *Hopson* specifically instructed trial courts and lower appellate courts not to automatically dismiss if a seaman's accident occurs off a vessel but to submit all of the disputed issues to a jury for its determination, because when judges preside over a Jones Act case, the common law rules of causal connection must be discarded, since the Jones Act is an avowed departure from the common law.

This Court recognized that each case must stand on its own facts, but a trial court is prohibited from automatically dismissing an action brought by a seaman based on an accident which occurs off a ship. All the issues of fact must be submitted to a jury.

> "The Jones Act incorporates the standards of the Federal Employers' Liability Act which renders an

> employer liable for the injuries negligently inflicted on its employees by its 'officers, agents, or employees.' We noted in *Sinkler vs. Missouri Pac R. Co.,* 356 U.S. 326, that the latter Act was 'an avowed departure from the rules of the common law' (id., at 329), which, recognizing '[t]he cost of human injury, an inescapable expense of railroading,' undertook to 'adjust that expense equitably between the worker and the carrier.' *Ibid.* In order to give 'an accommodating scope *** to the word "agents" ' (id., at 330-331), we concluded that 'when [a]n *** employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of the employer, such others are "agents" of the employer within the meaning of sec. 1 of FELA.' (id., at 331-332).
>
> . . . Respondent—the law says—should bear the responsibility for the negligence of the driver which it chose. This is so because, as we said in *Sinkler,* 'justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered.' 356 U.S. at 330. Reversed."

This Court though ruling in a Jones Act case, in *Hopson,* turned for assistance to an FELA decision *Sinkler v. Missouri Pacific,* 356 U.S. 326 since both Acts are inextricably entwined. The *Sinkler* decision extended FELA employer's liability to premises controlled by third persons other than the employer of the workman.

This Court in determining both Jones Act and FELA litigation relies on prior decisions originating from either statute to decide issues involving both statutes.

An example is that in *Sinkler* this Court relied upon an earlier Jones Act decision of *Kernan v. American Dredging,* 355 U.S. 426 to support its result.

Sinkler held that though an FELA-Jones Act employee may not suffer an injury on his employer's premises, the liberal purpose of the Jones Act cannot be thwarted because the location of the accident is off the vessel or the premises, but all disputed issues must be submitted to a jury for its determination.

This Court in *Sinkler* recognized that ordinary common law principles must be cast aside when a Jones Act seaman is injured in the "course of his employment" on property belonging to a third person because all of the issues of causal connection and foreseeability are factual issues which must be submitted to a jury:

> "However, in interpreting the FELA, we need not depend upon common-law principles of liability. This statute, an avowed departure from the rules of the common law, cf. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 507-509, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54. The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. *Kernan v. American Dredging Co.*, 355 U.S. 426, 431, 438. The Senate Committee which reported the Act stated that it was designed to achieve the broad purpose of promoting
>
> > 'the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden.' S. Rep. No. 460, 60th Cong., 1st Sess. 3.

> Thus while the common law had generally regarded the torts of fellow servants as separate and distinct from the torts of the employer, holding the latter responsible only for his own torts, it was the conception of this legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor. Hence a railroad worker may recover from his employer for an injury caused in whole or in part by a fellow worker, not because the employer is himself to blame, but because justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered. If this standard is not met and injury results, the worker is compensated in damages.
>
> This broad purpose controls our decision in determining whether the Belt Railway and its switching crew were 'agents' of the respondent within the meaning of the section. Plainly an accommodating scope must be given to the word 'agents' to give vitality to the standard governing the liability of carriers to their workers injured on the job. See *Kernan v. American Dredging Co., supra,* at 431-432, 438-439.

The Appellate Division decision was also contrary to this Court's FELA decision which reversed the dismissal of a Railway employee's action for injuries sustained off the employer's property, "while in the course of his employment" on the property of a third party.

In *Shenkler v. Baltimore & Ohio R. Co.*, 374 U.S. 1

(1962), the Supreme Court reinstated a plaintiff's jury verdict and held that the worker's employer, the Baltimore and Ohio Railroad, had a duty to inspect the property of another railroad upon which their worker was present and "acting in the course of his employment," at pp. 8-9 of their decision the Supreme Court:

> 'It would be most unreasonable and cruel to declare, that, while the faithful workman may obtain compensation from a company for defective arrangement of its own cars, he would be without redress against the same company if the damaged car that occasioned the injury happened to belong to another company.' 157 U.S. at p. 89.

At pp. 10-11 of its opinion the Supreme Court relied upon its prior decision of *Sinkler v. Missouri Pacific*, U.. 326, in pointing out that the strict standards of the common law no longer control FELA-Jones Act cases and that an employer cannot avoid liability when an employee sustains an injury "in the course of his employment" on the property of a third party:

> "In our opinion the case was submitted to the jury under proper insturctions, and there was a reasonable basis in the evidence for the verdict which the jury returned.
>
> Reversed."

The only circuit which refuses to adhere to *Hopson* and *Braen, supra*, is the Second Circuit which embraces *Wheeler v. West India, S.S. Co., supra.* The Third, Fifth, Sixth and Seventh Circuits comply with *Hopson* and *Braen* and the Ninth Circuit is split between two decisions.

The Third, Fifth, Sixth and Seventh Circuits follow the humanitarian precepts founded upon the Jones Act as dictated by *Hopson* and *Braen, supra*, that all disputed issues with regard to the Jones Act must be submitted to a

jury for their determination. See:

The Third Circuit in *Hamilton v. Marine Carriers*, 223 F.Supp. 233 (E.D. Pa. 1972).

The Fifth Circuit in *Vincent v. Harvey Well Service*, 441 F.2d 146, *Taylor v. Packer Diving and Salvage Co.*, 342 F.Supp. 365 (1971); *Webb v. Dresser Industries*, 536 F.2d 603 (1976) reh. den. 540 F.2d 1087, cert. den. 429 U.S. 1121; *Delancy v. Motichek Towing Service*, 427 F.2d 897.

The Sixth Circuit in *Henry Steinbrenner Limitation Proceedings*, 678 F.2d 636, 1982 AMC 2359; *C & O Railway Co. vs. Newman, Jr.*, 243 F.2d 804, 1957 AMC 2369, 2371.

The Seventh Circuit in *Ammesmaki vs. Interlake S.S. Co.*, 342 F.2d 627, 1965 AMC 1528 (7th Cir.), which refused to dismiss a seaman' accident when he was injured on the pier returning from shore leave.

The Ninth Circuit is split between the decision of *Williamson v. Western Pacific Dredging Co.*, 441 F.2d 65 (1971) and the decision of *Bates v. Prudential Grace Lines*, 375 F.Supp. 774, 497 F.2d 900 cert. den. 419 U.S. 1009.

This Court specifically instructs all trial and lower appellate courts that they cannot dismiss disupted factual issues including cauation and foreseeability in Jones Act cases because this remedial statute distinct from the Common Law, requires that those disputed issues be submitted to a jury.

POINT III

THIS DISMISSAL WAS CONTRARY TO DECISIONS BY THIS COURT WHICH HOLD THAT WHEN A JURY HAS FOUND AS IN THIS INSTANCE, THAT THE SEAMAN WAS INJURED "IN THE COURSE OF HIS EMPLOYMENT", SAID FINDINGS AUTOMATICALLY INVOKE JONES ACT LIABILITY LEAVING ALL ISSUES OF FACT WHICH INCLUDE CAUSATION FOR THE JURY

> Jury Interrogatory #1, submitted to the jury in the maintenance and cure trial:
> "Was plaintiff injured in the service of the ship?"
> Ans: Yes."

This jury finding that seaman Pires was injured in the "course of his employment" is a foundation for the imposition of the doctrine of Maintenance and Cure. It also simultaneously imposes Jones Act liability because this Court has recognized, it is a synonym for simultaneously finding that the seaman was injured "in the course of his employment", under the Jones Act.

All of the federal, trial and appellate courts have responded to the instructions of *Hopson, supra*, and *Braen, supra*, by submitting all issues of causal connection and foreseeability for acidents occurring off a vessel, to the jury.

In *Nowery v. Smith*, 69 F.Supp. 755 (E.D. Pa. 1946), aff'd 161 F.2d 732 (3 Cir. 1947), a district court recognized prior to *Hopson* and *Braen* that the identical parameters which identify Jones Act liability simultaneously casts the shipowner into an obligation to provide Maintenance and Cure:

> I recognize that in the *Aguilar* case, and companion case, *Waterman Steamship Corp. v. Jones*, the

Supreme Court expressly limited its decision to the facts before it. However, in both of these cases, it seems to me that it was the occasion for the seaman's absence from the vessel - shore leave - which determined that he was on 'the shipowner's business' while he was on premises which had to be traversed in going from or returning to the vessel. That being so, I think that logic compels the conclusion that the seaman should also be considered on 'the shipowner's business' while he is actually enjoying his shore leave. And if for the purpose of determining the shipowner's liability for maintenance and cure, the seaman is said to be on 'the shipowner's business while on shore leave, *I can see no valid reason why, for the purpose of determining the shipowner's liability under the Jones Act, the seaman should not be said to be "in the course of his employment" at the same time.* It is simply a questin of defindling the seaman's status; and I think that the concepts 'on the shipowner's business' and *'in the course of employment,'* as they are applied to the seafaring trade, comprehend identical factual situations. 69 F.Supp. 755. (Emphasis added.)

In the case of *Vincent v. Harvey Well Service*, 441 F.2d 146 (5 Cir. 1971), 1971 AMC 2541 at 2543-2544 the Court ruled:

On several occasions it has been held that an employee going either to or from work may be in the course of his employment. *Marceau v. Great Lakes Transit Corp., supra,* 1945 A.M.C. 233; *Magnolia Towing Company v. Pace*, (5 Cir. 1967), 1967 A.M.C. 2079, 378 F.2d 12. It is an easy problem--more accurately, not a problem at all-where the employee was performing work off the ship at the request or the order of the employer. In that situation

the seaman is plainly in the "course of his employment if "at the time of the injury,* * * he was doing the work of his employer pursuant to his employer's orders." Believing "that every seam should be caulked, every sail reefed, every line secured and every anchor set windward, "*United States v. Jones Financial Corp.*, (5 Cir. 1971), 437 F.2d 607, the Court concluded emphatically: "No more is required by the Jones Act." 361 U.S. at 133, 1960 A.M.C. at 6.

But though the Jones Act requires "no more," can the Act be satisfied with less? Considering the broad policy behind the Act and the consistently, liberal application of it, we readily answer in the affirmative.

In *O'Donnell v. Great Lakes Dredge & Dock Co., supra,* back in 1943, this Court recognized that the identical threshold for Maintenance and Cure is also a synonymous threshold for liability under the Jones Act.

"The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters. See Waring v. Clarke, 5 How (US) 441, 12 L ed 226, and New England Mut. M. Ins. Co. v. Dunham, 11 Wall. (US) 1, 20 L ed 90 supra.

It follows that the Jones Act, in extending a right of recovery to the seaman injured while in the service of his vessel by negligence, has done no more than *supplement the remedy of maintenance and cure* for injuries suffered by the seaman, whether on land or sea, by giving to him the indemnity which the maritime law afforded to a seaman of the vessel or its

tackle. Pacific S.S. Co. v. Peterson, 278 US 130, 73 L ed 220, 49 S Ct 75, supra. Since the subject matter, the seaman's right to compensation for injuries received *in the course of his employment*, is one traditionally cognizable in admiralty, the Jones Act, by enlarging the remedy, did not go beyond modification of substantive rules of the maritime law well within the scope of the admiralty jurisdiction whether the vessel, plying navigable waters, be engaged in interstate commerce or not. . . ."

The *Braen, supra*, decision pointed out that once a jury has found that a seaman sustained an accident "in the service of the ship", this jury finding automatically entitles him both to Maintenance and Cure and Jones Act damages, because the threshold for Maintenance and Cure and Jones Act are identical.

Though the Jones Act may be a negligence statute and Maintenance and Cure is a "no fault cause of action", the Pires jury finding in response to jury interrogatory No. 1 also brings seaman Pires into the ambit of the Jones Act.

This fact was brought to the Appellate Division's attention they failed to respond to it. The explanation is contained within a quote from *Braen*:

". . .These two cases were not brought under the Jones Act but involved maintenance and cure. Yet they make clear that the scope of a seaman's employment or the activities which was related to the furtherance of the vessel are not measured by the standards applied to land-based employment relationships. They also supply relevant guides to the meaning of the term "course of employment" under the Act since it is the equivalent of the "service of the ship" formula used in maintenance and cure cases. See GILMORE and BLACK, *The Law of Admiralty*, p. 284. And see *O'Donnel vs. Great Lakes Co.*,

supra, 318 U.S. at 43, 1943 A.M.C. 149; *Marceau vs. Great Lakes Transit Corp., supra.*

Hopson v. Texaco, supra, in 1966, was merely the logical progression of *Braen* and *O'Donnell, supra.*

> "We think those principles apply with equal force here. *These seamen were in the service of the ship* and the ill-fated journey to Port-of-Spain was a vital part of the ship's total operations. The ship could not sail with these two men, nor could it lawfully discharge them without taking them to the United States Consul. Indeed, to have abandoned them would have breached the statutory duty to arrange for their return to the United States. *Getting these two ill seamen to the United States Consul's office was, therefore, the duty of respondent. And it was respondent--not the seamen--which selected, as it had done many times before, the taxi service. Respondent--the law says-- should bear the responsibility for the negligence of the driver which it chose.* This is so because, as we said in *Sinkler*, justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that this safety while doing his part will not be endangered." 356 U.S., at 330. (Emphasis added)

It is most important for this Court to recognize that the *Braen* court explained that these synonymous thresholds when satisfied are a basis for liability simultaneously under the Doctrine of Maintenance and Cure and the Jones Act, 46 USC § 688.

POINT IV

THE APPELLATE DIVISION VIOLATED THE GENERAL MARITIME LAW IN DISMISSING THE PREJUDGMENT INTEREST AWARD

The First Department dismissing the prejudgment interest said (A-5):

> However, since the question of prejudgment interest, a factual issue in admiralty cases, was not presented to the jury, the trial court was without authority to fix an amount and we, therefore, delete such award. (Morales v. Garijak, Inc., 829 F.2d 1355. 1361; Havis v. Petroleum Helicopters, Inc., 664 F.2d 54, 55).

The Appellate Division misconstrued or overlooked the actual *Havis* decision, where the Fifth Circuit affirmed the addition of prejudgment interest by the trial court after a jury trial. See *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951 (5 Cir.)

> In an unpublished opinion, this court affirmed the entry of judgment in the Havis case on remand for prejudgment interest at the Louisiana legal rate. The defendants had appealed the amended judgment, arguing that the first Havis opinion precluded an award of prejudgment interest because the plaintiff had not sought to present the issue to the jury. It does not appear to us that the plaintiff objected to the trial judge's use of the Louisiana legal rate. We decline to consider the unpublished opinion precedent for the proposition that state law governs the disposition of this issue, since such a holding would fly directly in the face of the Harvis court's reliance on Robinson. Of course, since the issue is not before us, we express

no opinion as to whether Louisiana law does provide Wyatt a right to prejudgment interest.

Awards of pre-judgment interest by the court are the rule, not the exception in admiralty and maritime cases, and the Appellate Division erred in failing to follow the rule, relied upon by the lower court (A-20) citing cases.

In non-statutory cases like this, federal courts have regularly awarded prejudgment interest. In *Todd Shpyards v. Auto Transp.*, 763 F.2d 745, 1987 AMC 1831, 1842 indicated it is the "rule, not the exception," and the Fifth Circuit said in *Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1984 AMC 820 (5 Cir. 1983), at p. 837, it is the rule, and "it is not to be considered a penalty."

To the identical effect is *SCNO Barge Lines v. Sun Transport*, 775 F.2d 221 (8 Cir. 1985), 1987 AMC 152.

The award includes the imposition of prejudgment interest for damages known as "intangibles".

Intangibles for which pre-judgment interest has been allowed include pain and suffering, loss of nurture, guidance and loss of society.

The Fifth Circuit Court of Appeals cases of *Cantieri Navali v. Skyptron*, 802 F.2d 160, 1987 AMC 463, 470; *Hernandez v. M/V Rajaan* 841 F.2d 582, 1989 AMC 523, 534; and *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191, 1985 AMC 2941 at 2948-2949. *Mid-America Trans Co. vs. Rose Barge Line*, 477 F.2d 914, 1973 AMC 2251, Eighth Circuit Court of Appelas; *Magnolia Marine Transp. Lim. Procs.*, 1987 AMC 1167 (D. Kan 1986). Also supportive is a Ninth Circuit Court of Appeals decision *Stevens Tech. Services, v. Brooklyn*, 885 F.2d 534, 1990 AMC 363, 371, and a recent decision of Judge Carter in the *Omi Yukon Limitation Proceedings*, 733 F.Supp. 14 (SDNY 1990).

In a longshore action *Randolph v. Laeisz*, 896 F.2d 964, 1990 AMC 2377, the Circuit Court of Appeals imposed prejudgment interest in a non-statutory general maritime law action on behalf of a longshoreman.

The Third Circuit Court of Appeals in *Chung, Yong II v. Overseas Navigation Co., Ltd.* 774 F.2d 1043, 1056, reversed the trial judge's opinion because he abused his discretion in not awarding prejudgment interest.

In a general maritime law death case the Federal Circuits, the Second and Fifth, uniformly hold that the trial court need not previously inform the jury that he will add prejudgment interest to the verdict after they render judgment.

In *Snyder v. Whittaker Corp.* 839 F.2d 1085, 1988 AMC 2534, a statutory cause of action under Death on the High Seas Act, 46 USC Sec. 688, which does not specifically prohibit prejudgment interest was joined with a General Maritime Law cause of action for pain and suffering.

The trial court added prejudgment interest after the verdict which was approved by the appellate court.

The Fifth Circuit Court of Appeals also allowed an addition of prejudgment interest after the verdict:

> . . .The district court asked the jury to set each element of damages separately, and then the court itself performed the prejudgment interest calculation.

Similarly, the Second Circuit Court of Appeals in *Stissi v. Interstate Ocean Transp.*, (EDNY 1982), 1983 AMC 2980, mod. (2 Cir. 1983), 717 F.2d 252, 1983 AMC 2971, on remand (EDNY 1984), 590 F.Supp. 1043, 1985 AMC 1919, mod. (2 Cir. 1985), 765 F.2d 370, 1986 AMC 1032, Errata, 1986 AMC 3232 (2 Cir. 1987) (fee dispute) 814 F.2d 848, 1987 AMC 1441, recognized the practice in admiralty personal injury cases of awarding prejudgment interest after the jury verdict, the district court rejecting the argument made by the defendant that the jury was not previously informed that the court would award prejudgment interest.

> The fact that those admiralty decisions addressing the award of prejudgment interest were rendered in cases tried to the court is no indication that such interest is to be denied following a jury trial. The court concludes that it may award prejudgment interest in this case brought pursuant to general maritime law. (Emphasis added)

Any argument under maritime law that prejudgment interest cannot be awarded unless the court informs the jury must be discarded.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review that portion of the order of the New York Supreme Court Appellate Division, First Department which reversed the order of the New York Supreme Court on summary judgment and on prejudgment interest.

Respectfully submitted,

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APPENDIX A

S.M. PIRES et al.,

Plaintiffs-Respondents,

- v. -

FROTA OCEANICA BRASILEIRA, S.A., et al.,

Defendants-Appellants,

Galveston Wharves d/b/a Port of Galveston, et al.,

Defendants.

S.M. PIRES et al.,

Plaintiffs-Respondents,

v.

FROTA OCEANICA BRASILEIRA, S.A.,

Defendant-Appellant,

Eduardo Lopez as executor for the estate of Fernando Frota, et al.,

Defendants.

Supreme Court, Appellate Division, First Department.

May 1, 1990.

Before KUPFERMAN, J.P., and ASCH, WALLACH, SMITH and RUBIN, JJ.

MEMORANDUM DECISION

Order, Supreme Court, New York County (Edward J. Greenfield, J.), entered June 11, 1987, which denied defendants-appellants' motion for summary judgment dismissing the amended complaint, unanimously reversed, on the law, the motion granted and the first, second and fourth causes of action in the amended complaint dismissed, without costs.

Judgment, Supreme Court, New York County (Edward J. Greenfield, J.), entered October 21, 1988, upon a special jury verdict in favor of plaintiff S.M. Pires, solely on his cause of action for maintenance and cure against defendant Frota Oceanica Brasileira, S.A., in the sum of $1,323,666.70 (less $10,000 credited pursuant to stipulation of the parties) with interest to the verdict totalling $126,887.83 and interest from the verdict to October 20, 1988 totalling $39,031.10 together with costs and disbursements, unanimously modified, on the law, to delete the award of $126,887.83 in pre-judgment interest and otherwise affirmed, without costs.

Plaintiffs allege that on December 11, 1975, several hours after the Brazilian cargo vessel M/V Frotaleste docked in the Port of Galveston, plaintiff S.M. Pires, a merchant seaman employed as a wiper on the ship, went ashore to buy work gloves which were not available on board and were necessary for him to avoid skin burns on his hands from solvents used in the course of his work. At about 8:15 P.M., while walking south on 37th Street, which bisected a railroad yard, he was struck by a railroad hopper car, which was standing on and partially blocking 37th Street. The accident occurred as plaintiff was crossing the tracks when, suddenly and without warning, the railway car was caused to move backwards by a locomotive owned and operated by the Port of Galveston, which was engaged in the process of making up a train. As a result, plaintiff sustained severe and permanent injuries resulting in the amputation of his left leg.

Assuming the truth of the above allegations and assuming, for purposes of this motion, that defendants-appellants, individually or collectively, engaged in the operation of M/V Frotaleste and are, therefore, Jones Act (46 USC § 688) employers within the meaning of *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed 2d 252, and its progeny and that plaintiff was on ship's business at the time of the accident, defendants-appellants are,

nevertheless, entitled to summary judgment dismissing the causes of action against them

"Although an injury occurring ashore may be in the course of the seaman's employment, he cannot recover, in a Jones Act cause of action, unless he proves that the injury was caused by the negligence of any of the officers, agents or employees of the shipowner, for negligence of the shipowner or his agents is the gravamen of the Jones Act." (Norris, *The Law of Seamen* (4th ed.) § 30:31, p. 439 [footnotes omitted].)

Viewing plaintiffs' allegations in their most favorable light, we are left with the alternative theories that the Frotaleste was unseaworthy because it did not provide protective gloves for plaintiff; that he was therefore compelled to go ashore on his own to buy them; and, that, in permitting plaintiff to go ashore in a port with which he was unfamiliar, the ship's officers were negligent in not warning plaintiff of the dangers inherent in a railyard and in not providing him with a flashlight with which to traverse the darkened port area.

However, in order to sustain a cause of action for negligence, even one judged by the liberal standards of the Jones Act under which any negligence on the part of an employer, however slight, is sufficient to fix liability for a seaman's injuries, there must be a causal relationship between the alleged negligence and such injuries. (Norris, *The Law of Seamen*, *supra*, § 30:34). Thus, in order to recover under the Jones Act, a seaman must prove the existence of a duty, the negligent violation of this duty by his employer and a causal relationship of the violation to the injury sustained (*Id.*, p 460).

In the instant case, there is neither a sufficient showing of any violation of defendants-appellants' duty of care, nor any evidence that such violation, if any, was the proximate cause of plaintiff's injuries. A very similar situation was presented in *Wheeler v. West India S.S. Co.*, 103 F.Supp. 631, *affd.* 205

F.2d 354, *cert. den.* 346 U.S. 889, 74 S.Ct. 141, 98 L.Ed 393 where a seaman was returning at 2:00 A.M. from shore leave to his ship, which was docked at the end of a viaduct. It was very dark at the time and, as he jogged along to catch up with his shipmates, he was struck by a tender attached to a locomotive which was coasting backwards down the viaduct. As a result, the seaman lost both legs. In setting aside a jury verdict in favor of the plaintiff and entering judgment for defendant, the court concluded that even if an inspection of the viaduct by the ship's master, at the time of docking, would have disclosed that the walkways were damaged, that the railroad tracks were set flush with the viaduct's surface, that there were railroad cars on those tracks at the viaduct's offshore end and, possibly, that the viaduct lacked lighting facilities, such inspection would not have disclosed that a locomotive would be operating thereon, negligently or otherwise, at night. Likewise, in the instant case, even if it were found that the Frotaleste was unseaworthy or the shipowners were negligent in sending plaintiff ashore in an unfamiliar port at night without a flashlight, there is no evidence from which a jury could reasonably conclude that due diligence on the part of the shipowners or their employees could have prevented the allegedly negligent operation of the locomotive by the Port of Galveston. The contention that plaintiff was ashore on ship's business rather than for his own purposes does not alter the applicable standards of care or the requirement of a causal relationship between any negligence and plaintiff's injuries. Absent such causal relationship, plaintiff's causes of action for negligence under the Jones Act or, in the alternative, under the maritime law concept of unseaworthiness, as well as his wife's cause for loss of consortium must fall.

As to plaintiff's recovery for maintenance and cure, a no-fault concept, we find no reason to disturb the trial court's finding that differences between Brazilian law and United States law should be disregarded because Brazilian and United

States law on the subject are substantially identical, which conclusion was based on competent evidence at trial and in post-trial submissions. The record also supports the jury's award of $957,666.70 for future maintenance and care [sic] as an amount for a period, albeit lengthy, which can be definitely ascertained (*See, Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 531-32, 58 S.Ct. 651, 654-55 82 L.Ed. 993) and is sufficient to allow the plaintiff to be "so far cured as possible." (*Farrell v. United States*, 336 U.S. 511, 518, 69 S.Ct. 707, 711, 93 L.Ed. 850). Similarly, the jury's finding that the shipowner willfully, callously or arbitrarily withheld maintenance and cure was primarily factual in nature and was clearly not erroneous (*See, Legros v. Panther Services Group, Inc.*, 863 F2d 345, 352). However, since the question of pre-judgment interest, a factual issue in admiralty cases, was not presented to the jury, the trial court was without authority to fix an amount and we, therefore, delete such award. (*Morales v. Garijak, Inc.*, 829 F2d 1355, 1361; *Havis v Petroleum Helicopters, Inc.*, 664 F2d 54, 55).

We have considered defendant Frota's other arguments on the issue of maintenance and cure and find them to be without merit.

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS: PART 4

S.M. PIRES and VIRGINIA PIRES, his wife,	:	
Plaintiffs,	:	
- against -	:	Index No. 23829/76
FROTA OCEANICA BRASILEIRA, S.A., et al.,	:	
Defendants.	:	

GREENFIELD, J.:

In this seaman's action for maintenance and cure, brought by a Brazilian crew member of defendant's vessel for injuries sustained in a United States port, as a result of which at the age of 21 he lost his right leg and severely damaged his left leg, and after amputation proceeded to New York for rehabilitation, the defendant shipowner moves to set aside the jury's verdict awarding the plaintiff maintenance and cure. All post-trial motions are consolidated for disposition herein.

Plaintiff sued the shipowner under the Jones Act and under general maritime law, and sued the Port of Galveston, which operated the railroad engine that severed plaintiff's leg, for negligence.

As there were many procedural problems and problems of proof in the Jones Act and negligence aspects of the case, the court acceded to the request to sever and try the issue of

maintenance and cure under the general maritime law. Cf. Parker v. Texaco, Inc., 549 F. Supp. 71.

The right to maintain such a claim exists even if not explicitly pleaded in the complaint. The Magdapur, 3 F. Supp. 971; The Teviotdale, 166 F. 481. "Courts of admiralty have always liberally entertained jurisdiction on the plea of a seaman for maintenance and cure . . . It is based upon the necessity to prevent a failure or miscarriage of justice" and "results in much liberality of remedy". The Montezuma, 19 F. 2d 355. In the latter case the right to recover for maintenance and cure was held to survive even though not pleaded or argued below. Accordingly, this court had the simpler issue of maintenance and cure proceed to a jury trial, and this decision was affirmed by the Appellate Division. Pires v. Frota Oceanica, 130 AD 2d 986.

Maintenance and cure is a right granted to seamen under the general maritime law recognized by all nations, and dating back to the Middle Ages. It is a right to have necessary medical care provided until the point of maximum recovery and maximum medial benefit is reached, together with the requisite food and lodging needed during recovery. Maintenance and cure (or care) must be provided irrespective of the presence or absence of negligence on the part of the seaman or the shipowner. It is the earliest developed concept of "no-fault".

Justice Story analyzed the reason for requiring the provision of maintenance and cure for seamen back in 1823:

> "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports

> suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. * * *
>
> "On the other hand, if these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. . . He will never be tempted to abandon the sick to their forlorn fate, but his duty . . . will lead him to succor their distress, and shed a cheering kindness over the anxious hours of suffering and despondency." Harden v. Gordon, 11 Fed.Cas. 480, 483.

After trial on the vigorously contested issues of what treatment was needed to treat plaintiff's mangled and severed leg, what was the point of maximum cure, whether plaintiff was justified in seeking treatment in New York, and the sums required for medical treatment and for food and lodging, the jury awarded plaintiff a verdict totaling $1,323,666.70. The jury was requested to, and answered eight questions on which the special verdict was based. The questions, and the jury's answer were:

"1. Was plaintiff injured in the service of the ship? A. YES

2. Has plaintiff reached a point of maximum cure? A. NO

3. In seeking rehabilitation and cure did plaintiff act reasonably under the circumstances as they appeared to him in going to Rusk Institute in New York? A. YES

4. Should the shipowner be required to pay the expenses for rehabilitation and cure incurred in treatment in New York? A.YES

5. Did the shipowner furnish plaintiff required maintenance and cure? A. NO

6. What are the amounts, if any, for medical treatment and cure not supplied by the shipowner.

a. From December 11, 1975 to date? A. $6,000

b. For the future? A. $957,666.70

7. Did the shipowner provide required maintenance to the plaintiff? A. NO

What are the amounts, if any, due the plaintiffs:

a. December 11, 1975 to present? A. $200,000

b. For the future? A. $160,000

8. Did the shipowner willfully, callously, or arbitrarily withhold maintenance and cure from the plaintiff? A. YES

Defendant has moved to set aside the verdict on the grounds that the recovery would be barred under Brazilian law; that the award should not have covered sums incurred once the seaman was discharged from the Texas hospital where he was first treated; and that there was no basis for an award covering future medical expenses.

Authority of Court to Provide Remedy of Maintenance and Cure to Foreign Seamen Injured in the United States

It is the contention of defendant, a Brazilian corporation operating a Brazilian flag vessel, that the rights of the seaman employed by it to recover maintenance and cure must be based upon Brazilian, rather than United States law. Defendant did not, in its answer plead a defense of Brazilian law, and this

court denied its motion to strike plaintiff's not formally pleaded maintenance and cure claim from the trial calendar.

Defendant has submitted the affidavit of an expert in Brazilian law to effect that an employer under that law would be required to pay an injured seaman his wages for the first fifteen days of his disability and his medical or hospital expenses until his return to Brazil, when the employer's responsibility is terminated and his care is then undertaken by the National Health Service of Brazil. Plaintiff, on the other hand, has submitted an affidavit by his expert on Brazilian law to the effect that Brazil, like continental European states, and like the United States, has adopted the general maritime law which is descended from the ancient codes of the sea, and which is embodied and recognized in its legislative enactments.

Article 560 of the Brazilian Commercial Code provides that the curing of an illness is for the account of the vessel. A leading commentator has written that "the obligation of the shipowner to give medical assistance to the personnel of the crew is traditional and comes from time immemorial. . . The Brazilian code does not establish the time during which there should continue the obligation to cause the providing of treatment of the ill crew member. . . The text of our Code can be interpreted so as to attribute to the shipowner responsibility to the crew member until a complete recovery is achieved." J.C. Sampaio de Lacerda, *Curso de Dereito Privado da Navegacao*, (Vol. I, *Dereito Maritimo*, 3rd Ed., 1984.)

While the provisions of Article 560 have never been revoked, Brazil affords additional rights to Social Security benefits, but these do not bar the right to recover under Article 560.

The fact that the health and medical needs of a patient may have been handled differently had he been treated in Brazil and under the Brazilian National Health Service is of no

moment. That is an internal domestic program, not applicable to expatriates. It has no facilities outside Brazil and has no extra-territorial effect.

The plaintiff's injury was sustained in the United States, and he chose to be treated here, and to live here while being treated, a decision the jury found to be a reasonable one. This decision was founded on the evidence in the record that the medical rehabilitation services and prostheses available in the United States for an amputee are materially superior to those available had he gone back to Brazil. In fact, the testimony indicated that when the Brazilian Air Force had to deal with amputees, it sent them for treatment to the same place plaintiff went — to the Rusk Institute in New York.

Defendant has argued that while the injury was sustained in the United States, there would have been lesser entitlements under Brazilian law (from the employer for 15 days, then 10% of the monthly minimum wage at the place of treatment, paid by the Social Security System). CPLR 3016(e) requires that where the law of a foreign country is involved which would produce a different result than U.S. law, its substance must be pleaded. Defendant contends that even though it had not explicitly pleaded Brazilian law as a defense, plaintiff and the court were on notice that it would ask to have judicial notice taken of Brazilian law.

Even though not in compliance with CPLR 3016(e), the court will not consider that defendant's failure to plead foreign law is to be deemed final. See, Practice Commentary, McKinney's Sec. C3016:8, p. 76. Since there was no prejudice or surprise, this issue will not be determined on any narrow view of the adequacy of the pleading. Defects in pleading may be ignored if a substantial right of a party is not prejudiced. CPLR 3026. The court would prefer to deal with defendant's contention on the merits.

Plaintiff has submitted an affidavit from its own expert on Brazilian law to the effect that the Brazilian doctrine of maintenance and cure is identical to our own. We are dealing here with a foreign seaman who was injured in a United States port, and whose leg having been amputated, sought continuing treatment in the United States where he had been residing for eleven years at the time of the trial.

Under general maritime law, if adequate care has not been provided, the shipowner must pay for the private medical treatment chosen by the seaman. Jones v. Reagan, 748 F. 2d 1331; Kratzer v. Capital Marine Supply, Inc., 645 F. 2d 477, 482; Keiser v. American President Lines, Ltd., 384 F. Supp. 554. An award may properly be based on American costs and standards if there is evidence which may lead a jury to conclude that a foreign seaman would not receive adequate medical care in the land of his birth. Sosa v. M/V Lago Izabal, 736 F. 2d 1028, 1034. Plaintiff's rights in this country, where he has resided continuously since leaving the ship, are not to be governed by the internal provisions of the Brazilian Society Security System. His expenses were incurred in New York, not in Rio de Janeiro.

Maintenance and cure is an ancient remedy provided to seamen under the international law of the sea. It is not a creature of United States law. The ancient origins of the doctrine of maintenance and cure, promulgated under the Rules of Oleron, the Law of Wisby, and the Laws of the Hanseatic League have been traced in great detail by the United States Supreme Court in The Osceola, 189 U.S. 158 (1903) and Aguilar v. Standard Oil, 318 U.S. 724 (1943). As noted therein, the Rules of Oleron, from which most maritime law is descended, provided that "if by the master's orders and commands any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship." 189 U.S. at p. 169. See Norris, The

Law of Seamen, 4th Ed., Vol. 2, Secs. 26.3 to 26.6. The Supreme Court expressly noted the cognate provisions to be found in the Brazilian, Chilean, Argentine, Portuguese and Spanish codes. Article 560 of the Brazilian Code, which is still in effect, unmodified and unrescinded, was explicitly referred to as exemplifying the ancient doctrine of maintenance and cure. (189 U.S. at p. 170). Indeed, the general maritime law, as distinguished from U.S. statutory law, is "a non-national or international law of impressive maturity and universality". Lauritzen v. Larsen, 345 U.S. 571, pp. 581-582.

The law books are replete with the cases of foreign seaman serving aboard foreign flag vessels who sustain injuries in international waters or in U.S. ports and who are awarded recoveries in United States courts under general maritime law. The Magdapur, 3 F. Supp. 1971 (Singhalese seaman aboard a British vessel); The Teviotdale, 166 F. 2d 481 (Norwegian seaman on British ship); Adbul Samad v. SS Etivebank, 134 F. Supp. 530 (Pakistani crew member on British ship, damages assessed under the law of the country where the injury was suffered); Gkiafis v. S.S. Yiosonas, 387 F. 2d 460 (Greek seaman on Greek ship). Seaman are considered wards of the court, and occupy favored status. See, for example Cortes v. Baltimore Insular Line, 287 U.S. 367.

The seaman's right to maintenance and cure has been declared to be the "most pervasive" right of all, not to be defeated by restrictive distinctions nor to be "narrowly confined". Aguilar v. Standard Oil, supra p. 735. Recovery of maintenance and cure by the seaman sick or injured in the service of the vessel absent willful misbehaviour is a virtual certainty. It has been called an "unbeatable right". Bay State Dredging & Contr. Co. v. Porter, 153 F. 2d 827. It cannot be limited or abrogated by agreement between the parties. De Zon v. American President Line, 318 U.S. 660, 667; Cortes v. Baltimore Insular Line, supra.

The Obligation to Provide Maintenance and Cure Continues Until a Point of Maximum Medical Cure is Reached.

The right to recover for maintenance and cure, though easily established, is limited in scope. It does not include compensatory damages for pain and suffering or for the disability itself, unless caused by the shipowner's failure to provide it. The shipowner here has taken the position that once an injury is declared permanent, the obligation to provide maintenance and cure is at an end. In this case, defendant contends that once plaintiff's leg had been amputated there was no further hope, all medical efforts would be futile, and all further responsibilities on its part ceased.

The medical testimony in the case, however, indicated sharp dispute as to the point of maximum cure. Obviously, the obligation to provide medical treatment goes beyond emergency First Aid. Plaintiff's doctors, who were in charge of his treatment, testified that after the amputation, as an amputee he had to get continued psychological treatment and support (cf. Parker v. Texaco, Inc. 549 F. Supp. 71, where the plaintiff, being treated for hypertension and psychiatric problems, was found not to have reached "maximum cure"). The medical testimony on Pires was that physically he would not reach a point of maximum cure until he was able to walk without support and without dragging. According to Dr. Dong San Chu, an eminent specialist in Physical Rehabilitation at the Rusk Institute, the prosthetic device used would have to be continually adjusted to account for stump shrinkage, and would have to be replaced every 1 1/2 to 2 years. He declared intensive rehabilitation physically, socially, vocationally, and psychologically was still required. Defendant's doctors, Dr. Balensweig and Dr. Evans, contended that further treatment would not change plaintiff's basic condition, but agreed the prosthesis would have to be changed regularly, and the resultant depression would have to be treated as well. Having

heard the contentions of both sides, the jury concluded that the plaintiff had not reached a point of maximum cure up to the time of trial, and would require substantial medical treatment in the future.

Defendant relies on the doctrine enunciated by the United States Supreme Court in Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938) and Farrell v. U.S., 336 U.S. 511 (1949) that the shipowner's obligation continues until the sick or injured person has been cured, or the sickness or incapacity has been declared of a permanent character. It argues further that continuing treatment must in fact be curative, and not "merely beneficial" or palliative, and that treatment which helps the seaman improve or prevents deterioration of the condition is not part of maintenance and cure. While it is undoubtedly correct that the fact that an injury is permanent does not, of itself, entitle the seaman to maintenance and cure for life (Farrell v. U.S., supra; Luksich v. Misetich, 140 F. 2d 812, 814, cert. den. 322 U.S. 761 [1944]; Myles v. Quinn Menhaden Fisheries, Inc., 194 F. Supp. 197, 200, aff'd. 302 F. 2d 146), the real question is whether further medical treatment is required. His entitlement continues until care and nursing would not longer benefit him and "the maximum possible restoration has been accomplished". Shields v. United States, 175 F. 2d 743, cert. den. 338 U.S. 899; Page v. United States, 177 F. 2d 601. We surely have come far beyond the days of Long John Silver, who was fitted with a peg-leg for his stump, and left to shift for himself.

The question of when the point of maximum cure has been reached is particularly a medical, and not a legal question. This is a question of fact to be determined on the basis of the evidence presented. Korbut v. Keystone Shipping Co., 380 F. 2d 352; Stanovich v. Jurlin, 227 F. 2d 245; Bradt v. United States, 221 F. 2d 325. The jury heard the medical experts and concluded that maximum medical cure had not yet been reached, that the initial prosthesis originally supplied was

inadequate and had caused further damage to the remaining stump, and that further medical treatment would be required for the future. Plaintiff's expert testified that the sums required for past and future medical treatment would come to $3,017,437. The jury awarded one third that amount.

Great strides have been made in the techniques of rehabilitation in the past few years, so that one previously doomed to permanent disability can, with proper treatment, partially restore the shattered fragments of his life. An amputee need no longer just shrug his shoulders and accept his bitter fate. He is not to be left to his own devices because his condition has become hopeless. The hopeless case, if not totally curable, can be treated and the condition improved. If it can be improved, further treatment is warranted. The jury so found.

The Jury Award for Past and Future Maintenance and Cure was Supported by the Record.

The shipowner's obligation to provide maintenance under the general maritime law goes hand in hand with the duty to provide care and cure to the sick or injured seaman. Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528. The purpose of maintenance is to protect poor or improvident seaman while they are being treated in a foreign port. Vella v. Ford Motor Co., 421 U.S. 1, 3-4. Defendant has taken the position that an award can be made for maintenance only if the plaintiff has produced actual, detailed records of what he spent for food and lodging. That is not the case. Shipowners have been quick to press on the courts the amounts set forth for subsistence in union contracts as limiting the recovery for maintenance, despite proof that a seaman may have in fact spent more.

The amount and duration of maintenance to be awarded is essentially a question of fact. Caulfield v. AC & D Marine, 633 F. 2d 1129, 1132. It is not unreasonable to refer the jury

to agreed contract rates for subsistence, or to actual cost of living, rather than limiting an unlettered and unsophisticated seaman to a recovery based only on the scraps of receipts and records he may fortuitously maintained.

> "The amount necessary to ensure that a seaman receives appropriate maintenance and cure will vary according to the nature of his injury, the recovery process, and the place in which he is required to convalesce. Evidence of a seaman's actual expenses during his incapacity is a relevant starting point in this fact-specific inquiry, but it is not necessarily a sufficient finish line. Actual expenses do not always provide a satisfactory benchmark, because in many cases a seaman may not have sufficient funds to obtain the kind of maintenance the law provides him. *** The fact that a seaman is actually able to live on a pittance, however, does not limit him to that recovery. . ." McWilliams v. Texaco, Inc., 781 F. 2d 514, 518.

A labor economist who was research director for the National Maritime Union testified that subsistence costs for seamen (not including family members) increased from $21 a day to $37 a day, and that New York city had to be calculated at 13% above the national average. A jury, acutely familiar with what it takes to subsist in New York, awarded maintenance of $200,000 for the past 12 years, which comes to just $16,666 a year. (Cf. Incandela, infra, where maintenance award of $26.80 for 1976-1979 was upheld, and Wood v. Diamond M Drilling, 691 F. 2d 1165, cert. den. 460 U.S. 1069, where a Texas court upheld a maintenance award of $30 a day for 1979-1981). In view of such cases as McWilliams, supra, where the trials court's refusal to hear evidence as to reasonable cost of food and lodging in the place where seaman was recovering and limiting recovery only to those expenses actually incurred was reversed, defendant's

contention that without documented proof of actual expenditures there is no showing plaintiff "actually incurred any expenses at all" is simply fatuous.

Reference to cases where no maintenance was awarded because a seaman was taken care of in some institution or by others and incurred no expenses (e.g. Springborn v. American Commercial Barge Lines, Inc., 767 F. 2d 89) have no applicability to the situation here. There is no universal fixed rate for maintenance, and evidence presented by plaintiff as to what are necessary expenditures based on cost of living shifts the burden to the shipowner to prove such costs were excessive and that reasonable alternatives were available. Caulfield v. AC & D Marine, Inc., 633 F. 2d 1129, 1132-1133; Incandela v. American Dredging Co., 659 F. 2d 11. The monetary value to be ascribed to maintenance is a question of fact, and the evidence that can be considered by a court in determining the appropriate award for daily maintenance includes. . . "expert testimony regarding the cost of food and lodging in the area." Rutherford v. Sea-Land Service, Inc., 575 F. Supp. 1365, 1369, mod. o.g. 786 F.2d 943.

Defendant also contests the jury's award of $160,000 for future maintenance, relying on the 1938 holding in Calmar, supra. There the Supreme Court had reversed a lump sum award for future maintenance of a seaman suffering from a progressive and deteriorating condition, holding that the maintenance had to be an award "of small amounts to cover future maintenance and cure of a kind and for a period definitely ascertained or ascertainable." Id. p. 532. When the court in Calmar spoke of "small amounts", it should be remembered that a minimum wage was $12 a week and that one could subsist at a fraction of today's costs.

Similarly, in Farrell v. United States, 336 U.S. 511, lifetime maintenance was denied for a seaman who had become blind, although not barring further proceedings if further

medical treatment were required. The foreseeable period contemplates such time as is evidenced by the testimony of competent medical witnesses. Chesser v. General Dredging Co., 150 F. Supp. 592. In this case we have express medical testimony that future treatment and replacement of the prosthesis will be periodically required. (One of defendant's medical experts projected every 6 to 8 years, the other 18 to 24 months). "When the award is supported by physician's testimony courts have granted future maintenance". Lirette v. K & B Boat Rentals, 579 F. 2d 968, citing Domeracki v. Gulf Oil Corp., 342 F. 2d 219. If the jury's verdict was "within the universe of possible awards which are supported by the evidence" there is no basis for disturbing it. Bonura v. Sea-Land Service, Inc. 505 F. 2d 665; Miles v. Vicksburg Chemical Co., 588 F. 2d 512, 517. The jury here did not award a life pension to plaintiff. It provided funds just sufficient for the next four years. Under the circumstances, it would not have been necessary to relegate the plaintiff to having to commence a new action every two years or so.

Upon Refusal to Pay Maintenance and Cure, a Ship Owner May be Subject to Damages for Aggravating a Condition, and for Attorneys' Fees and Punitive Damages

In Vaughan v. Atkinson, 369 US 527, (1962), the United States Supreme Court, dealing with the duty of the ship owner to provide maintenance and cure when the seaman was incapacitated until the point of maximum medical recovery, held that where the shipowners were "callous in their attitude", neither admitting nor denying the seaman's claim and compelling him to hire a lawyer and go to court to get what was plainly owed under laws centuries old, it would be "difficult to imagine a clearer case of damages suffered for failure to pay maintenance and cure." See also, Robinson v. Pocahantas, 477 F. 2d 1048, where the charge of the trial court

permitting the jury to consider an award of punitive damages was approved.

In this case the jury made an express finding that the shipowner "willfully, callously, or arbitrarily" withheld maintenance and cure from the plaintiff. This gives rise to claims for further damages. Not only is a seaman who is denied proper maintenance and cure permitted to recover legal expenses and punitive damages, but he may recover consequential damages as well, for the suffering and physical handicaps incurred because of the failure to give timely maintenance and cure. Gaspard v. Taylor Diving & Salvage Co., 649 F. 2d 372, 376; Blanchard v. Cheramie, 485 F. 2d 328; United States v. Sims, 186 F. 2d 972, cert. den. 342 U.S. 816.

> "If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt. The Iriquois, 194 U.S. 240." Cortes v. Baltimore Insular Lines, 287 U.S. 367.

Plaintiff also claims that he is entitled to have prejudgment interest added to the jury's award, citing Gillmore [sic] & Black, *The Law of Admiralty*, 1975 ed., p. 314. In a maintenance and cure case, the federal maritime rule rather than the ordinary rule of state law prevails, and the awarding of such interest, while discretionary, is the rule rather than the exception. Billiot v. Toups Marine Transport, Inc., 465 F. Supp. 1265; Belaire v. Mobile Oil Co., 709 F. 2d 1031; SCNO Barge Lines v. Sun Transport, 775 F. 2d 221. Judgment may be entered accordingly. Given the jury's findings, plaintiff may also pursue the appropriate remedy to recover the consequential damages which flow from the

unwarranted refusal to provide that which he was legally entitled to.

The foregoing constitutes the decision and order of the court.

Dated: July 27, 1988

/s/
J. S. C.

Filed July 28, 1988
County Clerk's Office, New York

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 1, 1990.

Present - Hon. Theodore R. Kupferman, Justice Presiding
Sidney H. Asch
Richard W. Wallach
George Bundy Smith
Israel Rubin Justices.

---x

S.M. Pires and Virginia Pires, his wife,

Plaintiffs-Respondents,

- against -

Frota Oceanica Brasileira, S.A., Eduardo Lopez as executor for the estate of Fernando Frota, Omnium Transportation Co. (Liberian Corp.), Omnium Agencies, Inc., J. Dixon Byrne as executor for the estate of James Byrne, 39075

Defendants-Appellants,

Galveston Wharves d/b/a Port of Galveston, Board of Trustees of Galveston Wharves and City of Galveston d/b/a Port of Galveston,

Defendants.

---x

An appeal having been taken to this Court by the above-named appellants, from an order of the Supreme Court, New York County (Edward Greenfield, J.), entered on June 11, 1987, which denied defendants-appellants' motion for summary judgment dismissing the amended complaint,

And said appeal having been argued by Joseph F. DeMay, Jr., [sic]* of counsel for the appellants, and by Kenneth Heller, of counsel for the respondents; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby reversed, on the law, without costs and without disbursements, the motion granted and the first, second and fourth causes of action in the amended complaint dismissed.

ENTER:

FRANCIS X. GALDI

Clerk.

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* Original order should read "argued by Thomas E. Süles."

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 1, 1990.

Present - Hon. Theodore R. Kupferman, Justice Presiding
Sidney H. Asch
Richard W. Wallach
George Bundy Smith
Israel Rubin Justices.

----------x

S. M. Pires and Virginia Pires, his wife,

Plaintiffs-Respondents,

- against -

Frota Oceanica Brasileira, S.A.,

Defendant-Appellant, 39076

Eduardo Lopez as executor for the estate of Fernando Frota, Omnium Transportation Co. (Liberian Corp.), Omnium Agencies Inc., J. Dixon Byrne as executor for the estate of James Byrne, Galveston Wharves d/b/a Port of Galveston, Board of Trustees of Galveston Wharves and City of Galveston d/b/a of Galveston,

Defendants.

----------x

An appeal having been taken to this Court by the above-named appellant, from a judgment of the Supreme Court, New York County (Edward Greenfield, J.), entered on October 21, 1988, upon a special jury verdict in favor of

plaintiff S.M. Pires, solely on his cause of action for maintenance and cure against defendant Frota Oceanica Brasileira, S.A., in the sum of $1,323,666.70 (less $10,000 credited pursuant to stipulation of the parties) with interest to the verdict totalling $126,887.83 and interest from the verdict to October 20, 1988 totalling $39,031.10 together with costs and disbursements.

And said appeal having been argued by Thomas E. Stiles, of counsel for the appellant, and by Kenneth Heller, of counsel for the respondents; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein.

It is unanimously ordered that the judgment so appealed from be and the same is hereby modified on the law, to delete the award of $126,887.83 in prejudgment interest and otherwise affirmed, without costs and without disbursements.

ENTER:

FRANCIS X. GALDI

Clerk.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

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S.M. PIRES and
VIRGINIA PIRES, his wife,

Plaintiffs,

- against -

FROTA OCEANICA BRASILEIRA S.A., FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp., OMNIUM AGENCIES INC., JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES and CITY OF GALVESTON d/b/a PORT OF GALVESTON,

Defendants.

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Index No.: 23829/76

Calendar No.: 82141

JUDGMENT AFTER JURY TRIAL ON CAUSE OF ACTION FOR MAINTENANCE AND CURE

The issues on plaintiff, S.M. PIRES' cause of action for maintenance and cure against defendant, FROTA OCEANICA BRASILEIRA, S.A., having been severed and having come on for trial before Mr. Justice Edward J. Greenfield, and a jury, at I.A.S. Part 4 of this court at the courthouse at 60 Centre Street, New York, New York, on June 17, 18, 19, 22, 24, 25, 26, 29 and July 1 and 2, 1987; and

Plaintiff, S.M. PIRES, having appeared by his attorney, Kenneth Heller, Esq. and

Defendants, FROTA OCEANICA BRASILEIRA, S.A., FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.), OMNIUM AGENCIES, INC. and JAMES BYRNE, having appeared by their attorneys, Cichanowicz, Callan & Keane, by Joseph DeMay, Esq. and David Van Oss, Esq. and

Defendants, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES and CITY OF GALVESTON d/b/a PORT OF GALVESTON, having appeared by their attorneys, Hunton & Williams, by Thomas McMahon, Esq.

And the issues having been duly tried, and the court having requested the jury to answer special questions posed to them on the issues of maintenance and cure which the jury answered on July 2, 1987, upon which a verdict was entered with the Clerk against the shipowner of record, defendant FROTA OCEANICA BRASILEIRA, S.A., and an order having been entered on July 28, 1988 denying the post-trial motions of defendant, FROTA OCEANICA BRASILEIRA, S.A. and ordering that judgment be entered in favor of plaintiff, S.M. PIRES, on the issue of maintenance and cure, reserving all other issues as to actual ownership and control of the vessel, consequential damages for failure to provide maintenance and cure, and attorney's fees under the rule of Vaughan v. Atkinson, 369 U.S. 527 to a subsequent trial on the issues of Jones Act and negligence liability.

NOW, on the aforesaid special verdict and upon the order of this court entered on July 28, 1988 in the office of the Clerk of New York County, and on the motion of Kenneth Heller, Esq., attorney for plaintiff, S.M. PIRES, it is

ORDERED, ADJUDGED AND DECREED, that plaintiff, S.M. PIRES, residing at 237-81st Street, Brooklyn, New York, recovers of defendant, FROTA OCEANICA

BRASILEIRA, S.A., residing at Avenida Venezuela, 110, Rio de Janeiro, Brazil, the principal amount of $1,323,666.70 (less the sum of $10,000.00 credited pursuant to the attached stipulation) with interest to the verdict totaling $126,887.83, and interest from the verdict to October 20, 1988 totaling $39,031.10 together with costs and disbursements taxed in the sum of $4,378.26, totaling $1,483,963.89 and that plaintiff have execution therefore.

Dated: New York, New York
October 20, 1988

/s/ Edward J. Greenfield
J.S.C.

/s/ Norman Goodman
Clerk

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NEW YORK

S.M. PIRES, et ano.,	:	
	:	
Plaintiffs.	:	N.Y. County Clerk's
	:	Index No.
- against -	:	23829/1976
FROTA OCEANICA BRASILEIRA S.A., et al.,	:	STIPULATION
	:	
Defendants.	:	

IT IS STIPULATED AND AGREED by and between the undersigned attorneys for plaintiffs and for defendants, FROTA OCEANICA BRASILEIRA, S.A., FERNANDO FROTA, OMNIUM TRANSPORTATION COMPANY, OMNIUM AGENCIES, INC. and JAMES BYRNE ("OMNIUM defendants") that:

1. Payment of $10,000.00 for a new prosthesis and therapy for plaintiff, STARKHEISER PIRES, is not to be considered an admission of liability on the part of any one or more of the OMNIUM defendants.

2. The $10,000.00 shall be credited as of the date paid against the principal amount of any award for medical expenses or cure included in any judgment which might be entered in favor of one or more of the plaintiffs against one or more of the OMNIUM defendants.

3. An order to this effect may be entered by any of the foregoing parties without further notice to any party.

Dated: New York, New York, July 5, 1988

/s/

KENNETH HELLER
335 Broadway 614
New York, New York 10013
(212) 962-6085
Attorney for Plaintiffs

/s/

CICHANOWICZ CALLAN & KEANE
21 West Street, 26th Floor
New York, New York 10006-2908
(212) 344-7042
Attorneys for OMNIUM Defendants

APPENDIX F

Questions for the Jury in Pires v. Frote Oceanica, et al

1. Was plaintiff injured in the service of the ship? Yes

2. Has plaintiff reached a point of maximum cure? No

If yes:

a. When he left Galveston on February 28, 1976? Yes__ No__

b. When he received the Rusk prosthesis in 1985? Yes__ No__

c. At any other time? Yes__ No__

d. Will he need treatment for the rest of his life? Yes__ No__

3. In seeking rehabilitation and cure did plaintiff act reasonably under the circumstances as they appeared to him in going to Rusk Institute in New York? Yes

4. Should the shipowner be required to pay the expenses for rehabilitation and cure incurred in treatment in New York? Yes

5. Did the shipowner furnish plaintiff required maintenance and cure? No

6. What are the amounts, if any, for medical treatment and cure not supplied by the shipowner:

a. From December 11, 1975 to date? $6,000

b. For the future? $957,666.70

7. Did the shipowner provide required maintenance to the plaintiff? No

What are the amounts, if any, due the plaintiffs:

a. December 11, 1975 to present? $200,000.

b. For the future? $160,000

8. Did the shipowner willfully, callously, or arbitrarily withhold maintenance and cure from the plaintiff? Yes

Total $1,323,666.70

(Jury unanimous on all questions)

SUPREME COURT OF THE STATE OF NEW YORK TRIAL TERM PART 22

at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present: Hon. Edward J. Greenfield

Justice.

S.A. Pires and Virginia Pires

-against-

Frota Oceanica Brasileira, et al

The following papers numbered 1 to.....read on this motion.....

***

Upon the foregoing papers this motion is decided in accordance with accompanying memorandum decision.

Dated MAY 26 1987

s/ EJG
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

S.M. PIRES and VIRGINIA PIRES, his wife,

Plaintiffs,

-against-

FROTA OCEANICA BRASILEIRA, S.A.; FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.); OMNIUM AGENCIES, INC., JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES, d/b/a PORT OF GALVESTON and CITY OF GALVESTON,

Defendants.

GREENFIELD, J.

Frota Oceanica Brasileira, Fernando Frota, Omnium Transportation Co., Ominium Agencies, Inc., and James Byrne have moved to dismiss the amended complaint and have asked for summary judgment in favor of the defendants.

This action arises out of injuries sustained by the plaintiff on the waterfront in Galveston, Texas, a short distance from his ship. As a result of being run over in the railroad switching yard adjacent to the ship's dock at night, plaintiff suffered the traumatic amputation of his right leg.

The motion of the defendants is predicated on three grounds: (1) that any claim plaintiff may have can be brought only against his employer, Frota Oceanica Brasileira; (2) that inasmuch as the accident took place on shore, there was no breach of duty owing by the shipowner to the plaintiff; and (3) the owner had no duty of Maintenance and Cure under the circumstances.

I. OWNERSHIP AND CONTROL.

The plaintiff alleges that despite the Brazilian trappings of the vessel on which he was employed, and the fact that his contract of employment was with Frota Oceanica Brasileira, in truth, as in Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, the ship may have actually been controlled by an owner or owners in the U.S. The flag of the vessel, the nationalities of the seamen, and the parties to the employment contract are considered only "minor weights" in determining whether one is a Jones Act employer. Id, p.310. The most important factor in determining American ownership are ownership of the stock and the location of the base of operations for the managing and chartering of the vessel. Moncada v. Lemuria Shipping Corp., 491 F 2nd 470 (2d Cir), cert. den. 417 U.S. 947. The question of whether the vessel flew the Brazilian flag merely as a "flag of convenience" or is subject to the Jones Act must be determined by an examination of the underlying facts. See Pandazopoulos v. Universal Cruise Line, 365 F Supp. 208.

Prior to examination of these facts, and complete exploration in discovery proceedings, it would be premature to dismiss the action against individuals or entities who are alleged to have exercised real control. Accordingly, that branch of the motion seeking summary judgment because of lack of ownership is denied, as is the branch of the motion seeking to vacate notices of discovery as to the control exercised by defendants Fernando Frota, Omnium Transportation Co., Omnium Agencies, Inc. and James Byrne.

II. RESPONSIBILITY FOR ACCIDENTS ASHORE

The contention by the defendants that they owe no duty to a seaman employed by them beyond the end of the vessel's gangway (Dangovich v. Isthmian Lines Inc., 218 F. Supp. 235, 237, aff'd 327 F. 2d 355) is an over-simplification. The United States Supreme Court has held in Aguilar v. Standard Oil Co., 318 U.S. 724, that the liability of a ship owner may include accidents occurring between the moored ship and the public streets. It is alledged here that because the plaintiff had sustained burn injuries to his hands when carrying out his duties aboard ship, he was going ashore either to get appropriate medication for his hands, or for proper gloves to protect them,

and that therefore, in disembarking, he was still in the ship's service--that he was not going ashore merely on shore leave for his own pleasure. It is alleged that plaintiff's superiors told him the route to follow from the ship into the city, and may even have accompanied him, without warning him of the proximity of railroad activity. Plaintiff was a stranger to the port, he could not find his way about the unlighted harbor at night and spoke no English. Ugarte v. U.S. Lines Inc., 105 AD 2d 606 (1984) is not to the contrary. Unlike what is alleged here, the plaintiff there had gone on shore leave and had chosen on his own to climb between two railroad boxcars, the dangers of which were open and apparent. Under these circumstances, questions of fact are raised as to the scope of the responsibility of the defendants which preclude summary judgment.

III. MAINTENANCE AND CURE

The owners of a ship have an obligation, wholly separate and apart from liability for unseaworthiness or for shore-based accidents, to provide Maintenance and Cure to seamen injured in the service of the ship. Vaughn v. Atkinson 369 U.S. 527. This obligation is wholly separate and apart from any obligation arising under the Jones Act. The obligation to provide Maintenance and Cure appears to be an obligation of the general maritime law, irrespective of the flag of the vessel. For these reasons, because responsibility for Maintenance and Cure is a separate and distinct issue from questions of negligence and Jones Act responsibility, this court has directed that the Maintenance and Cure aspects of this case be tried prior to the resolution of the other questions raised. This determination has been approved by the Appellate Division, and the court will deal with that issue separately.

On this motion, defendants' application for summary judgment or to vacate or modify the disclosure notices is denied.

Dated: May 26, 1987

NOTE OF ISSUE MEMORANDUM
DECISION, J. GREENFIELD,
DATED 8/19/86

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

S.M. PIRES and VIRGINIA PIRES, his wife,
Plaintiffs,

-against-

FROTA OCEANICA, BRASILEIRA, S.A. FERNANDO FROTA, OMNIUM TRANSPORTATION CO., (Liberian Corp.), OMNIUM AGENCIES, INC., JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES d/b/a PORT OF GALVESTON and CITY OF GALVESTON d/b/a PORT OF GALVESTON,
Defendants.

Greenfield, J.:

Defendant Frota's motion to strike the case from the calendar and to vacate the note of issue is denied. The issue to be tried is plaintiffs' entitlement to maintenance and cure. By decision of October 3, 1977, this court denied plaintiff's motion for partial summary judgment, but did not grant judgement to defendant on this issue. That left the case with issues of fact to be tried as to maintenance and cure: While the court noted in passing that plaintiff did not allege a cause of action for maintenance and cure, that is not tantamount to a ruling as law of the case. See *Credit Francais* v. *Sociedad Financiera De Comercio*, 138 Misc 2d 564, 575.

Paragraphs 19 and 20 of the amended complaint do, in fact, allege a basis for plaintiffs' claim of maintenance and cure. Whether defendant ship owner is liable for such maintenance and cure is among the issues to be resolved upon trial.

This matter is wholly separate and apart from the claims of liability asserted against the ship and defendant Galveston Wharves, which can be dealt with hereafter.

Dated: August 19, 1986

APPENDIX I

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 26, 1990

Present - Hon. Theodore R. Kupferman Justice Presiding

Sidney H. Asch
Richard W. Wallach
George Bundy Smith
Israel Rubin Justices

S.M. Pires and Virginia Pires, his wife,

Plaintiffs-Respondents,

against

Frota Oceanica Brasileira, S.A., Eduardo Lopez, as executor for the Estate of Fernando Frota, Omnium Transportation Co. (Liberian Corp.), Omnium Agencies, Inc., J. Dixon Byrne, as executor for the estate of James Byrne,

Defendants-Appellants,

Galveston Wharves, d/b/a Port of Galveston, et al.,

Defendants.

Plaintiffs-respondents having moved for reargument of, or in the alternative for leave to appeal to the Court of Appeals from, the order of this Court entered on May 1, 1990,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had theron,

It is ordered that the motion be and hereby is denied. (See M-2076, decided simultaneously herewith.)

ENTER:

APPENDIX J

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 26, 1990

Present-Hon. Theodore R. Kupferman Justice Presiding

Sidney H. Asch
Richard W. Wallach
George Bundy SMith
Israel Rubin Justices

S.M. Pires and Virginia Pires, his wife,

Plaintiffs-Respondents,

against

Frota Oceanica Brasileira, S.A.,

Defendant-Appellant,

Eduardo Lopez, et al.,

Defendants.

Defendant-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered on May 1, 1990,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion be and hereby is denied. (See M-2465, decided simultaneously herewith.)

ENTER:

APPENDIX K

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of November A.D. 1990

Present, Hon. Sol Wachtler Judge presiding

Mo. No. 1003

S.M. Pires and Virginia Pires, his wife,

Appellants,

v.

Frota Oceanica Brasileira, S.S., et al.,

Respondents,
Defendants.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

---Donald M. Sherar
Clerk of the Court

APPENDIX L

State of New York
Court of Appeals

Mo. No. 39

S.M. Pires and Virginia Pires,
his wife,

Appellants,

v.

Frota Oceanica Brasileira, S.A.,
et al.,

Respondents,

et al.,

Defendants.

Motion for reargument of motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

(2)

91-127

No.

Supreme Court, U.S.
FILED
JUL 19 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

S.M. PIRES and VIRGINIA PIRES, his wife,

Petitioners,

vs.

FROTA OCEANICA BRASILEIRA S.A.,

Respondent,

EDUARDO LOPEZ as Executor for the Estate of FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.), OMNIUM AGENCIES INC., J. DIXON BYRNE as Executor for the Estate of JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES and CITY OF GALVESTON d/b/a PORT OF GALVESTON,

Defendants.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION

THOMAS E. STILES
Counsel of Record

Shaun F. Carroll
Nourse & Bowles
Attorneys for Respondent
One Exchange Plaza at 55 Broadway
New York, New York 10006
(212) 952-6200

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. May summary judgment be granted in favor of a defendant shipowner in a Jones Act case where there is no evidence of a causal connection between the alleged negligence and the claimed injury?

2. In a maritime case tried to a jury, may the trial court add prejudgment interest to the jury verdict where there is evidence that the jury already took interest into consideration in its award?

LIST OF PARTIES

The parties to the proceedings below are as follows:

Plaintiffs Below

S.M. Pires and Virginia Pires, his wife.

Defendants Below

Frota Oceanica Brasileira S.A., Eduardo Lopēz as Executor for the Estate of Fernando Frota, Omnium Transportation Co. (Liberian Corp.), Omnium Agencies Inc., J. Dixon Byrne as Executor for the Estate of James Byrne, Galveston Wharves d/b/a Port of Galveston, Board of Trustees of Galveston Wharves and City of Galveston d/b/a Port of Galveston.

Parties to this Proceeding

Only Frota Oceanica Brasileira S.A. has been named as a respondent to this appeal. The following statement is provided in accordance with Rule 29.1 of the Rules of the Supreme Court of the United States.

Respondent Frota Oceanica Brasileira S.A.'s corporate parents and the subsidiaries which it directly or indirectly owns by less than one hundred percent are listed in Appendix C.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

S.M. PIRES and VIRGINIA PIRES, his wife,

Petitioners,

vs.

FROTA OCEANICA BRASILEIRA S.A.,

Respondent,

EDUARDO LOPEZ as Executor for the Estate of FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.), OMNIUM AGENCIES INC., J. DIXON BYRNE as Executor for the Estate of JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES and CITY OF GALVESTON d/b/a PORT OF GALVESTON,

Defendants.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION

OPINIONS BELOW

Frota Oceanica Brasileira, S.A. opposes certiorari to review the memorandum decision and order of the Supreme Court of the State of New York, Appellate Division, First

Department, officially reported at 161 A.D.2d 129, 554 N.Y.S. 2d 855 (1st Dept. 1990) which reversed the lower court. The opinion and order of the Appellate Division are reprinted in Petitioner's appendix at 1a and 22a respectively.

The decision and order of the lower court dated May 26, 1987, denying summary judgment, is reprinted in Petitioner's appendix at 34a.

COUNTER STATEMENT OF THE CASE

I. *Counter Statement of Facts*

Petitioner Pires was a Brazilian seaman working on board the FROTALESTE, a Brazilian flag ship owned and operated by Respondent, Frota Oceanica Brasileira, S.A. ("Frota"), a Brazilian corporation. On December 11, 1975, the FROTALESTE was docked at the Port of Galveston, Texas. Pires and three other shipmates were going into town at approximately 8:00 p.m. on a Sunday night to telephone their wives in Brazil and look at the Christmas lights in town. At about 8:15 p.m., while walking south on 37th Street, which bisected a railroad yard, Pires was struck by a railway hopper car, which was standing on and partially blocking 37th Street. The accident occurred as Pires was crossing the tracks when, suddenly and without warning, the railway car was caused to move backwards by a locomotive owned and operated by the Port of Galveston, which was engaged in the process of making up a train. As a result, Pires sustained severe and permanent injuries resulting in the amputation of his leg.

II. *Counter Statement of the Proceedings Below*

The Jones Act claim which is the subject of this petition is one of several causes of action in this case, some of which remain the subject of proceedings below, and all of which may

yet be reviewed by the New York State Court of Appeals. The history of the case, briefly, is as follows.

In November 1976, Pires commenced the subject action against Frota and other named defendants in New York State Supreme Court alleging a personal injury claim under 46 U.S.C. §688 (the "Jones Act") and the general maritime law of unseaworthiness.

In 1977, petitioner Pires moved for summary judgment on a claim for maintenance and cure, and the trial court ruled that such a claim was not stated or stateable on the facts plead. The parties then continued with a straight Jones Act case.

Petitioner's first notice of deposition was served on July 25, 1977. Respondent moved for a protective order on August 10, 1977 on the ground that the underlying claim was baseless.

Petitioner then did nothing in this case for four months, at which time they served a notice of deposition dated January 24, 1978. Respondent immediately moved to strike that notice on February 8, 1978 once again on the ground that since the claim was baseless on the merits, depositions of persons with no knowledge of the accident constituted harassment. Petitioner opposed that motion in papers dated February 22, 1978.

The trial court did nothing to resolve this motion for nine (9) years.

In the interim, Petitioner moved to strike Respondent's answer for failure to produce the witnesses by motion dated December 19, 1978. Respondent opposed by motion papers dated December 28, 1978.

Again, the trial court did nothing to decide this motion for nine (9) years.

In February 1983, Respondent Frota moved for summary judgment on the Jones Act claim and sought to strike the outstanding notices of deposition.

On September 22, 1986, the Petitioner filed a notice of trial for an unpleaded cause of action for maintenance and cure. Frota and the other defendants moved to strike the notice of trial. The court denied that motion and proceeded to trial.

The trial court decided the outstanding discovery motions by order dated May 26, 1987, nine years after the motions were filed, denying the motion to strike the pleadings and directing the defendants to produce the witnesses.

At the same time, the trial court also denied Frota's 3 1/2 year old motion for summary judgment on the Jones Act claim by order dated May 26, 1987.

Frota immediately appealed from the trial court's ruling on the Jones Act summary judgment motion.

In June 1987, the court conducted a jury trial on the issue of Frota's liability for maintenance and cure. In July 1987, the jury returned a verdict of $1,323,666.70 for the Petitioner.

On October 20, 1988, the court entered a judgment against Frota on the basic maintenance and cure claim, stating that the court was reserving several other issues relating to Jones Act and negligence liability, and also consequential damages from the so called failure to pay maintenance and cure. (Petitioner's Appendix at 6a).

Frota appealed from the maintenance and cure judgment on November 18, 1988.

Thereafter, in January 1989, the parties proceeded to trial on the issue of consequential damages which arose from the alleged failure to pay maintenance and cure. This trial resulted

in a jury verdict in plaintiff's favor awarding, *inter alia*, $24,000,000.00 in punitive damages. On February 21, 1989, Frota moved to set aside the punitive damage portion of the jury's verdict on the ground that such damages are not recoverable under *Vaughn v. Atkinson*, 369 U.S. 527 (1962). Frota's post trial motion has gone undecided for over two years at this point. As a consequence, there is no judgment entered as to the quantum of consequential damages, exemplary punitive damages and attorneys' fees in this case, though all of those claims have been fully tried.

Frota's appeals from the order denying summary judgment on the Jones Act claim, and the maintenance and judgment were heard together by the New York State Supreme Court Appellate Division in January 1990. On May 1, 1990 the New York State Supreme Court Appellate Division, First Department issued an order and a memorandum decision reversing the decision below and summarily dismissing Pires' Jones Act claim against Frota and modifying and affirming the judgment in favor of Pires on his claim for maintenance and cure. (Petitioner's Appendix at 1a).

On May 8, 1990 Frota moved in the Appellate Division, First Department for leave to appeal to the New York Court of Appeals from the maintenance and cure judgment. Pires sought leave to appeal from the dismissal of the Jones Act claim.

On July 26, 1990 the Appellate Division denied Frota's motion for leave to appeal to the Court of Appeals in respect of the maintenance and cure claim. The same day, the Appellate Division denied Pires' motion for leave to appeal to the Court of Appeals in respect of the dismissal of the Jones Act claim.

By motion for leave to appeal filed with the Court of Appeals on August 2, 1990, Frota timely sought leave to appeal to the Court of Appeals from the maintenance and cure judgment and the order of the Appellate Division affirming that

judgment. Pires sought leave to appeal from the dismissal of the Jones Act claim.

By Order of November 27, 1990, the Court of Appeals denied Frota's motion for leave to appeal the maintenance and cure claim "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution." (Respondent's Appendix at A-1).

The same day, November 27, 1990, the Court of Appeals denied Pires' motion for leave to appeal from the Jones Act dismissal, again "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution." (Petitioner's Appendix at 42a). Pires moved for reargument. The Court of Appeals denied Pires reargument by order dated March 21, 1991. (Petitioner's Appendix at 43a).

By Petition to this Court dated April 15, 1991, Frota sought a Writ of Certiorari to the Supreme Court of the State of New York Appellate Division in respect of the maintenance and cure judgment.

By Order dated June 10, 1991, this Court denied Frota's petition for a Writ of Certiorari. (Respondent's Appendix at A-2).

By an undated Petition served on June 19, 1991, Pires now seeks a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department in respect of the order dismissing the Jones Act claim.

There is still no judgment entered as to the consequential damages, punitive damages and attorneys' fees in respect of the maintenance and cure claim in this case.

REASONS FOR DENYING THE WRIT

I. *This Appeal Is Not Ripe For Review By This Court.*

The Court should deny the Petition for a Writ on the ground that the order sought to be appealed from lacks finality. Petitioner seeks review of an order that has not yet been considered by the New York State Court of Appeals. 28 U.S.C. §1257 authorizes this Court to grant certiorari to hear "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." The decision of the New York State Appellate Division, First Department, an intermediate appeals court, is not a final order so long as review by the Court of Appeals is possible. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

As the foregoing counterstatement of the proceedings below makes clear, the New York State Court of Appeals has, thus far, only declined to review the parts of the case brought to its attention, including the order dismissing the Jones Act claim, because the orders appealed from "do not finally determine the action." The New York State Court of Appeals, it appears, is waiting for all pending proceedings below to be resolved. It is certainly possible that the New York State Court of Appeals will review this case in its entirety as and when the trial court finally resolves the last claims pending before it, and the parties exhaust any related appeals at the Appellate Division level. Since the New York State Court of Appeals may yet deal with the federal issues raised in this petition, it appears that this Court should decline to issue a writ at this time in respect of the order dismissing the Jones Act claim.

Frota notes that this Court recently denied its Petition for a Writ of Certiorari to review an order of the New York State Appellate Division rendered in respect of the maintenance and cure claim in this action, which order had also not yet been reviewed by the New York Court of Appeals. Accordingly, it

seems that Pires' Petition for a Writ of Certiorari in respect of the Jones Act claim should properly be denied for the same reason.

At this point, it seems that the case should be reviewed as a whole by the New York State Court of Appeals before it is brought to this Court. The Court should deny the Petition for a Writ.

II. *The Decision Below Is Correct In All Respects.*

Pires argues that this Court should grant certiorari because the New York Appellate Division allegedly dismissed the Jones Act claim simply because the injury took place ashore. (Respondent's Petition at 4-7). Petitioner further argues that once it was established in a related proceeding that the Petitioner was in the vessel's service when injured, the Jones Act claim had to be submitted to the jury on the issue of causation and the Appellate Division erred in dismissing the case summarily. (Respondent's Petition at 22). Petitioner is incorrect on both points. The decision below did not turn solely on a finding that Pires was injured ashore, nor did the Appellate Division ignore that Pires may have been in the ship's service when injured.

In reversing the lower court's order, the Appellate Division assumed that Pires' factual allegations regarding the alleged unseaworthiness and negligence of the vessel owner were true for purposes of the appeal below. Even assuming those facts were true, the Appellate Division correctly found there was no merit to Pires' Jones Act claim.

For an injured seaman to recover under the Jones Act, he must prove three things:

(l) that he was a seaman;

(2) that he was injured in the course of his employment; and

(3) that the injury was caused by his employer's negligence.

Lindgren v. Tugboat Dalzellable, Inc., 26 N.Y.2d 455, 459-60, 259 N.E.2d 916, 311 N.Y.S.2d 495, 498 (1970); Norris, The Law of Seaman §30:31 (4th ed.).

The central issue in this case, and the focus of the Appellate Division's decision below, is causation. Petitioner's citations to *Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129 (1959), *Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943); *Nowery v. Smith*, 69 F. Supp. 755 (E.D.Pa. 1946), *aff'd*, 161 F.2d 732 (3rd Cir. 1947), are all inapposite. Those cases concern themselves with the second prong of a Jones Act claim listed above, and stand for the proposition that a seaman may be injured "in the service of the vessel" even though the injury takes place ashore. Those cases do not apply here because the Appellate Division did not dismiss the case simply because the Petitioner was injured off the vessel or was otherwise not in the ship's service. In this case, for purposes of the appeal only, it was and is assumed that the petitioner was "in the service of the ship" when injured. The decision below focuses on causation. Frota argued below that there was no evidence of negligence on their part which was causally connected to the accident, and the Appellate Division agreed. They found no evidence of breach of any duty of care owed by Frota to Pires, and even assuming the conditions complained of existed and amounted to a breach of duty, there was no showing that such conditions were a proximate cause of petitioner's injuries.

Petitioner's arguments with respect to their "feather weight" burden on causation miss the point of the Appellate

Division's decision. Though a seaman's burden of proof on the issue of causation may well be less than in a common law suit, it does exist. *Litherland v. Petrolane Offshore Constr. Services, Inc.*, 546 F.2d 129 (5th Cir. 1977) The point of the decision below is that "even judged by the liberal standards of the Jones Act," no jury could reasonably find a causal connection between Petitioner's allegations of negligence on board the ship and Pires' injury. *Pires v. Frota Oceanica Brasileira, S.A., et al.*, 161 A.D. 129; 554 N.Y.S.2d 855 (1st Dept. 1990). The Petitioner was injured by a train negligently operated by Galveston Wharves on a public highway, blocks from the ship. Whatever Frota allegedly did or did not do on the ship, it did not cause the injury for which Petitioner has claimed. That injury was caused by the negligent act or acts of Galveston Wharves. The acts of Galveston Wharves "were of such an extraordinary nature or so attenuates defendant's [conduct] from the ultimate injury that responsibility ... may not be reasonably attributed to the defendant." *Ordonez v. Long Island Railroad Company,* 112 A.D.2d 923, 492 N.Y.S.2d 442, 443 (1985) (*quoting Kush v. City of Buffalo,* 59 N.Y.2d 26, 33, 449 N.E.2d 725, 462 N.Y.S.2d 831, (1983)).

The Court should deny the Petition for a Writ because the decision below is correct in all respects.

III. *The Dismissal Of The Lower Court's Award Of Pre-Judgment Interest Was Proper*

As to the award of prejudgment interest stricken by the Appellate Division, it should first be noted that Petitioner here seeks to appeal from an order of the Appellate Division separate from the order which dismissed the Jones Act claim. The award of prejudgment interest occurred in connection with the judgment in Petitioner's favor on his maintenance and cure claim, not the Jones Act claim. The maintenance and cure claim was tried solely to a jury. No issues were reserved to the court.

In these circumstances, the rule is that the court may not add prejudgment interest to the award of the jury, which sat as trier of fact. *Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54 (5th Cir. 1981). *Morales v. Garijak, Inc.*, 829 F.2d 1355 (5th Cir.) (Judicial supplement of prejudgment interest to maintenance and cure jury award stricken on appeal.) This is consistent with the general rule in federal law forbidding judicial awards of prejudgment interest in cases tried to a jury unless it is very clear the jury did not consider interest in its deliberations. *Middle E. Eng. Dev. v. Arkwright-Boston Mfrs.*, 675 F. Supp. 855 (S.D.N.Y. 1987). In this case, the jury verdict indicates that they did allow for interest. The jury verdict for past maintenance and cure is for an amount *greater* than that testified to by petitioner's expert at trial. *See, Maintenance & Cure Record on Appeal,* Vol. II, p.1380-81; 6182-85; 2025. The only fair conclusion is that this extra sum represents an allowance for interest. The Appellate Division properly struck the supplemental award of prejudgment interest by the trial court.

Though it is not clear that Jones Act cases necessarily govern awards of prejudgment interest in a maintenance and cure case, Frota notes that Petitioner incorrectly contends that *Snyder v. Whittaker Corp.*, 839 F.2d 1085 (5th Cir. 1988) overrules *Morales v. Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987) on the issue of the propriety of prejudgment interest in a Jones Act case. In fact, *Snyder* reinforces *Morales* when it restates the general rule in Jones Act cases:

> "if a seaman's personal injury claim under the Jones Act is tried at law, "he can have a jury but must forego prejudgment interest; if he elects to proceed in admiralty, he can have prejudgment interest but no jury."

Snyder v. Whittaker Corp., 839 F.2d 1085, 1094 (5th Cir. 1988).

If in *Snyder* prejudgment interest was added by the court after the jury verdict, as it was, it was because *Snyder* involved a claim under the Death on the High Seas Act (DOSHA) and the Court expressly refused to follow the acknowledged rule in Jones Act cases. The rule is that prejudgment interest is not added to a jury verdict in a Jones Act case.

Petitioner also relies on *Stissi v. Interstate and Ocean Transport Co.*, 590 F. Supp. 1043, 1049 (E.D.N.Y. 1984) for the position that the law in the Second Circuit is that a court may add prejudgment interest to a jury award. *Stissi* is distinguished in the more recent Second Circuit case, *Middle E. Eng. & Dev. v. Arkwright-Boston Mfrs.*, 675 F. Supp. 855, 858 (S.D.N.Y. 1987) which restates the rule "that a judge generally may not add prejudgment interest to a jury award of damages." Id. at 858. *Middle E. Eng. & Dev.* distinguished *Stissi* as a case where there was no danger of a jury's having already compensated a petitioner for delay in his receiving his award. Id at 858. Again, the facts in this case indicate that the jury awarded prejudgment interest for all past due sums. Therefore, the trial court was without authority to add interest after the verdict.

The Court should deny the Petition for a Writ because the court below properly struck the trial court's supplemental award of prejudgment interest.

CONCLUSION

For the foregoing reasons, the Court should decline to issue a Writ of Certiorari in this case.

Respectfully submitted,

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Dated: New York, New York
July 19, 1991

APPENDIX

APPENDIX A

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of November A.D.1990

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

1-14 Mo. No. 903

S.M. Pires and Virginia Pires, his wife,

Respondents,

v.

Frota Oceanica Brasileira, S.A.,

Appellant,

et al.,

Defendants.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

/s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 10, 1991

Mr. Thomas E. Stiles
Nourse & Bowles
One Exchange Plaza at 55 Bdwy.
New York, NY 10006

Re: Frota Oceanica Brasileira, S.A.
v. Starkheiser DaSilva Matos Pires
No. 90-1582

Dear Mr. Stiles:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,
/s/ William K. Suter
William K. Suter, Clerk

APPENDIX C

LIST OF PARENTS AND DIRECT AND INDIRECT SUBSIDIARIES

Frota Amazonica, S.A.
Cirne, Cia Industrial Do Rio Grande Do Norte
Salmac; Comercio; Industria, Exportacao E Importacao S/A
Afrofrota Taxi Aereo Limitada
C.B.A. Cia Brasileira De Aquicultura
S/A Salineira Do Nordeste - Sosal
Fragoso Pires Comercio E Industria S/A
Cia de Participacoes E Empreendimentos Cope
Seguradora Oceanica S.A.
Banco Vega S.A.
Equisul Transportes Ltda.
Tersal - Terminal Salineiro De Aroja Branca S.A.
Codfbra Ltda.
Sabrena, Soc de Reparos Navais Ltda.
Azevedo Bento S.A. Comercio E Industria
Vega S/A Corretora De Valores
Pamar, Participacoes Maritimas
J.C. Pires and Filhos Participacoes, S/A

(3)

No. 91-127

Supreme Court, U.S.
FILED
JUL 26 1991
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

S.M. PIRES and VIRGINIA PIRES, his wife,

Petitioners,

vs.

FROTA OCEANICA BRASILEIRA S.A.,

Respondent,

EDUARDO LOPEZ as Executor for the Estate of FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.), OMNIUM AGENCIES INC., J. DIXON BYRNE as Executor for the Estate of JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES and CITY OF GALVESTON d/b/a PORT OF GALVESTON,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

REPLY BRIEF OF PETITIONERS

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No. 91-127

In The
Supreme Court of the United States
October Term, 1991

S.M. PIRES and VIRGINIA PIRES, his wife,
Petitioners,

vs.

FROTA OCEANICA BRASILEIRA S.A.,
Respondent,

EDUARDO LOPEZ as Executor for the Estate of FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.), OMNIUM AGENCIES INC., J. DIXON BYRNE as Executor for the Estate of JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES and CITY OF GALVESTON d/b/a PORT OF GALVESTON,
Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

REPLY BRIEF OF PETITIONERS

Respondent does not doubt nor does he controvert the issue being presented to this Court: that the New York Court of Appeals and the Second Circuit Court of Appeals refuse to follow the United States Supreme Court rulings of *Tenant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29,

35 (1944); *Lavender v. Kurn,* 327 U.S. 645 (1945); *Schultz v. Pennsylvania Railroad,* 350 U.S. 522 (1956); *Tiller v. Atlantic Coast Railway,* 318 U.S. 54 (1943); *Gallick v. Baltimore & Ohio Railroad Co.,* 372 U.S. 108 (1963); *Rogers v. Missouri Pacific Co.,* 352 U.S. 500, 506, (1957); *Ferguson v. Moore-McCormack,* 352 U.S. 521 (1957); *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U.S. 36 (1943); *Braen v. Pfeifer Oil Transport Co.,* 361 U.S. 129 (1959); *Hopson v. Texaco,* 383 U.S. 262 (1966); and *Sinkler v. Missouri Pacific,* 356 U.S. 326 (1958), which require submitting the issue of causation to a jury for determination. In a Jones Act, Breach of Warranty of Seaworthiness and General Maritime Law case, the issue of proximate cause is an issue of fact that must be resolved by the jury. It cannot be decided as a matter of law by the Court, unlike a Court in a land based tort case where the common law applies.

The Third, Fifth, Sixth, and Seventh Circuits have followed the Supreme Court rule of submitting the issue of causation to the jury, while the Ninth Circuit is split. Only the Second Circuit and the New York State Court of Appeals have refused to follow the United States Supreme Court rule and broken away from all the other circuits which have followed the United States Supreme Court.

The case of *Litherland v. Petrolane Offshore Construction Services, Inc.,* 546 F.2d 129 (5th Cir. 1977), cited by respondent at page 10, follows the United States Supreme Court rule of submitting the issues of causation to the jury because it is an issue of fact, noting "we accord the jury's verdict traditional respect given to the finder of facts."

The fact that the Pires accident happened off the ship does not prevent a finding of proximate cause and liability. See Point II, pages 15-21 of Petition, citing *O'Donnell,*

Braen, Aguilar, Hopson, and *Sinkler, supra.*

Respondent misrepresents the case of *Middle East Engineering & Development Co. Ltd., v. Arkwright-Boston,* 675 F. Supp. 855 (S.D.N.Y. 1987) as a Second Circuit case holding that a judge may not add prejudgment interest to a jury award. In fact, this is only a District Court case. The Second Circuit case of *Earl v. Bouchard Transportation,* 917 F. 2d 1320 (2 Cir. 1990) approved the award of prejudgment interest.

POINT I

THE CASE IS RIPE FOR REVIEW

Respondent states that the petition for a writ of certiorari should be denied because this case is not ripe for review. As the Court pointed out in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029 (1975), cited by respondent at page 7 of its opposing brief, complete finality is not necessary to confer jurisdiction upon the Court to grant a writ. Rather, as the Court pointed out at 420 U.S. 477, 478, 95 S. Ct. 1037, a state judgment is final within the meaning of 28 U.S.C. §1257, where additional proceedings would not require the decision of other federal questions that might also be required by the Court at a later date and immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice.

This is just such a case. The issue before the Court is a separate federal question which has been taken as far as possible in the New York State Court system. Respondent makes much of the fact that the New York Court of Appeals denied petitioner's motion for leave to appeal to that

Court on the ground that the order of the Appellate Division from which petitioner sought to appeal did "not finally determine the action within the meaning of the Constitution" [of the State of New York].

The finality requirement for appeal to the New York Court of Appeals is more stringent than the corresponding requirement of this court. See, for example §5611 of the New York Civil Practice Law and Rules which states:

> "If the Appellate Division disposes of all the issues in the action its order shall be considered a final one."

The necessity of a complete disposition of all aspects of the case is simply not a factor in determining whether to issue a writ of certiorari. See *Cox Broadcasting, supra,* and *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 69 S. Ct. 1221 (1949).

This case, therefore, is ripe for review by way of writ of certiorari. This application should be treated on the merits.

POINT II

THE STATE COURT DETERMINATION SOUGHT TO BE REVIEWED CONFLICTS WITH SETTLED FEDERAL LAW.

The Appellate Division of New York granted respondent's motion for summary judgment on the Jones Act aspect of this case, because of the alleged lack of a causal connection between the negligence of the ship's officers and the occurrence (3a). In so doing that Court overlooked this Court's holding in the landmark case of *Ferguson v. Moore-McCormack Lines,* 352 U.S. 522, 77 S.Ct. 457 (1957).

In *Ferguson, supra,* plaintiff, a ship's baker, sustained severe injuries while using a knife in attempting to remove frozen ice cream from its container, so that it could be quickly served to the passengers. The United States Court of Appeals for the Second Circuit, 228 F. 2d 891, had reversed a judgment entered on a jury verdict in plaintiff's favor, and dismissed the complaint, holding that as a matter of law, it was not reasonably foreseeable that plaintiff would use a knife for that purpose.

In reversing the Court of Appeals, this Court pointed out that the standard of liability in a Jones Act case is not the same as in common-law negligence. Rather, it is the standard established by Congress under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* Quoting from the companion case of *Rogers v. Missouri Pacific Railroad Co.,* 352 U.S. 500, 77 S.Ct. 443 (1957), Justice Douglas, speaking for the Court said:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest,* in producing the injury or death for which damages are sought." (Emphasis supplied).

Applying that standard, the Appellate Division's grant of summary judgment was plainly erroneous. The Appellate Division treated this as a common-law negligence case. As *Ferguson* demonstrates, it is not.

The real issue in this case is the liability of shipowners under the Jones Act and under the doctrine of unseaworthiness, for accidents to seamen in the service of the vessel while ashore. The Appellate Division, relying on *Wheeler v. West India S.S. Co.,* 103 F. Supp. 631, affd. 205 F. 2d 354, a Second Circuit case, held that no recovery could be had under such circumstances (4a).

The Second Circuit stands alone on this point. The *Wheeler* decision is at odds with *Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129 (1959); *Hopson v. Texaco Inc.*, 383 U.S. 262 (1966); *O'Donnell v. Great Lakes Dredge and Dock Co.*, 318 U.S. 36 (1943) and *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 633 S. Ct. 930 (1923). All these cases state that off-vessel accidents to Jones Act seamen are not subject to automatic dismissal because of their locations. The *Wheeler* decision was handed down prior to this Court's *Braen* and *Hopson* decisions, *supra.*

As we pointed out at page 5 of our petition herein, the Third, Fifth, Sixth and Seventh Circuits follow *Braen* and *Hopson.* The pertinent citations are set forth at page 21 of the petition. The Ninth Circuit appears to be split between the decisions of two of its panels. Compare *Williamson v. Western Pacific Dredging Co., 441 F. 2d 65 and Bates v. Prudential Grace Lines,* 375 F. Supp. 774, 497 F. 2d 900.

In the interests of uniform interpretation of the Jones Act, the writ of certiorari should be granted so as to resolve this conflict.

POINT III

THE APPELLATE DIVISION'S REFUSAL TO ALLOW PREJUDGMENT INTEREST ON THE AWARD OF MAINTENANCE AND CURE WAS ERRONEOUS.

The Trial Court pointed out, correctly, that the awarding of prejudgment interest in maintenance and cure cases, while discretionary, is the rule and not the exception (2a). See to the same effect, the cases cited at page 28 of our petition herein.

In mistaken reliance on certain Fifth Circuit cases (5a) the Appellate Division overturned the Trial Court's award of interest on maintenance and cure. The Appellate Division cited *Havis v. Petroleum Helicopters Inc.*, 664 F. 2d 54 (5th Cir. 1981) and *Morales v. Garijak, Inc.*, 829 F. 2d 1355, 1361 (5th Cir. 1987). In *Havis,* the Court awarded pre-judgment interest, at the rate prescribed by the state having the most contact with the case, despite the fact that the matter of interest had not been submitted to the jury.

The *Morales* court misconstrued *Havis.* Citing *Havis,* the Court held that, because the issue of interest had not been submitted to the jury, interest could not be awarded. Of course, *Havis* said nothing of the sort. In fact, it said the exact opposite. Nevertheless, the Appellate Division cited *Morales* and miscited *Havis,* while ignoring all other authority to the contrary.

If *Morales* is now the law in the Fifth Circuit, it is at odds with the cases cited at page 28 of our petition. For the sake of uniformity, the writ should be granted.

CONCLUSION

THE WRIT SHOULD ISSUE

Dated:
New York, New York
July 26, 1991

Respectfully submitted,

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Suite 614
New York, New York
(212) 962-6085